TRANSCRIPT OF RECORD.

Supreme Court of the United States.

October Term, 1914.

No.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, AND W. P. WELLS, SUBSTITUTED TRUSTEE, APPELLEES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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(1a) UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, on the first Tuesday in February, being the third day of the same month, in the year of our Lord one thousand nine hundred and fourteen.

Present:

Hon. J. C. Pritchard, Circuit Judge.
Hon. Charles A. Woods, Circuit Judge.
Hon. John C. Rose, District Judge.

Among other were the following proceedings, to-wit:

Claude M. Dean, Appellant,

vs.

R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, Bankrupt, et al., Appellees.

Be it remembered that heretofore, to-wit, on June 18, 1913, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

TRANSCRIPT OF RECORD.

Filed June 18, 1913.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF VIRGINIA, } ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the United States Court room, in the Post Office Building, in the City of Richmond, on the first Monday in April, being the seventh day of the same month in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Henry A. M. Smith, Judge of the District Court of the United States for the District of South Carolina, designated to sit in the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

R. Beale Davis, trustee in bankruptcy of the estate of R. Crawley Jones, Bankrupt, } Complainant,

v.

W. P. Wells, substituted trustee, and Claude M. Dean, } Defendants.

BILL OF COMPLAINT

Filed March 5, 1912.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

R. Beale Davis, Jr., as trustee in bankruptcy of the estate of R. Crawley Jones, Bankrupt, Plaintiff,

v.

William P. Wells, trustee substituted in the place and stead of E. C. Dean, the trustee named in a certain deed of trust executed by R. Crawley Jones and Marie E. Jones, his wife, dated September 3rd, 1909, and Claude M. Dean, the beneficiary under said deed of trust, Defendants.

In Equity.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

And now comes R. Beale Davis, Jr., as trustees of the estate in bankruptcy of R. Crawley Jones, a citizen of the State of Virginia, and residing in the City of Petersburg, Virginia, and for his cause of complaint against the above named defendants does respectfully show to this Honorable Court and allege:

First. That the above named defendants, at the times hereinafter mentioned, were and now are citizens of the State of Virginia, residing in said Eastern District; the said W. P. Wells residing in the County of Dinwiddie, and the said Claude M. Dean in the City of Richmond.

Second. Your orator further shows that heretofore, to-wit, on the 25th day of April, 1910, the said R. Crawley Jones was duly adjudicated a bankrupt, in accordance with the Acts of Congress relating to bankruptcy, by this Honorable Court, on a petition of certain creditors praying that he be so adjudicated, filed in said court on the (3) 24th day of December, 1909. On the 8th day of April, 1911, a first meeting of the creditors of said bankrupt was, after due and proper notice, held before George S. Bernard, Esq., referee in bankruptcy at his office in the City of Petersburg, Virginia, to whom the matter in said bankruptcy had been referred. At this said meeting the creditors failed to elect a trustee of the estate of said bankrupt, and on the 12th day of April, 1911, your

orator was appointed by said referee trustee of the estate in bankruptcy of the said R. Crawley Jones and on the same day duly qualified as such trustee by accepting said trust and filing the bond required by the order of his appointment, which said bond was duly approved by said referee in bankruptcy, and your orator has since that time acted as and now is such trustee.

Third. And your orator further shows that, by virtue of the Acts of Congress relating to bankruptcy. your orator as trustee of the estate in bankruptcy of the said R. Crawley Jones, became vested with all of the property of the said bankrupt, of whatever kind, character, nature and description whatsoever, as of the date that the said R. Crawley Jones was adjudicated a bankrupt, and also to all rights of action which the creditors of said R. Crawley Jones had at the time of the said adjudication, to avoid all transfers made by said bankrupt and to recover property so transferred, or its value, and to recover property transferred by said bankrupt in fraud of his creditors, and to recover all property, or its value, transferred by R. Crawley Jones within four months prior to the date of the filing of the petition and before adjudication, if the effect of such transfer was to enable such transferee to obtain a greater percentage of his debts than any other creditor of the same class. and the person or persons so receiving it, or to be benefited thereby, or his or their agent or agents acting therein, shall have (4) had reasonable cause to believe that the said transfer was intended to give a preference under said bankruptcy act.

Fourth. On the 3rd day of September, 1909, there were held by The Virginia National Bank of the City of Petersburg, Virginia, certain notes, given for amounts aggregating about $1,600.00, made and executed by the said R. Crawley Jones, and purporting to bear the endorsements of certain other persons; that on or about the 1st day of September, 1909, the said R. Crawley Jones, for reasons best known to himself, became very anxious and desirous that said notes be gotten out of the possession of said bank at once, and forthwith communicated his anxiety and desires as to said notes to his father, J. Samuel Jones and through his father to his brother-in-law, the said Claude M. Dean, who was living in the City of Richmond, Virginia; that the said J. Samuel Jones made a trip to that city on the 1st day of September, 1909, and after talking over the matter fully with the said Claude M. Dean it was agreed between them that

they would take up and get possession of said notes; that on the 3rd day of September, 1909, the said Claude M. Dean met the said J. Samuel Jones by appointment in the City of Petersburg, Virginia, and on the same day they together went to said bank and took up said notes, the said Claude M. Dean furnishing for that purpose the sum of $1,600.00, and said notes were then and there delivered to the said Claude M. Dean, and your orator is informed, believes, and therefore charges, that said notes, taken up as aforesaid, are still in the possession of and held by the said Claude M. Dean; that at the time said notes were gotten out of the possession of said bank, to-wit, on the 3rd day of September, 1909, some of said notes were not even due and payable, and the said J. J. Samuel Jones, the said Claude M. Dean and the said R. Crawley Jones well knew such to be the case.

(5) Fifth. And your orator further shows that on the 10th day of September, 1909, seven days after said notes had been gotten out of the possession of said bank as aforesaid, the said R. Crawley Jones and Marie E. Jones, his wife, executed and delivered to one E. C. Dean, as thustee, who was the father of the said Claude M. Dean, and the said Marie E. Jones, a certain deed of trust conveying to said trustee the following described real and personal property, to-wit:

"All the household goods and furniture now contained in the house of the said parties of the first part at Darvil, Va., Dinwiddle County, as follows:

One (1) walnut bed room suit, consisting of ten pieces viz., wardrobe, bed, bureau, washstand, center-table, four chairs and rocker; one (1) mahogany parlor suit, consisting of six (6) pieces, viz., divan, two chairs, one table and two rockers; two (2) bed room suits, consisting of two dresses, two washstands and two iron beds; one dining room suit, consisting of one extension table, sideboard, one china closet, twelve chairs; one kitchen set, consisting of one stove, one safe, one kitchen *cabin*, one table; two sets of toilet, one refrigerator; one hall suit, consisting of one hall rack, one table and one chair, one chiffonier, o- settee or divan and two chairs, one stool also in dining room, and one leather couch, and the following live stock, consisting of two cows, one yearling and nine head of hog, contained on the property of the said parties of the first part; and all and singular the crops of corn and tobacco now on the land and property of the said parties of the first part, in the County of Dinwiddie, Va., and the tobacco now cut and at present on the premises of the said

parties of the first part, and all other corn and tobacco on the said premises; and all and singular the goods, the stock of goods and merchandise now in the store of the said parties of the first part, located at Darvill, in Din-
(6) widdie County, Va., consisting of dry goods and notions, boots, shoes, hats, caps, druggist sundries, hardware and groceries, which latter consists of lard, sugar, coffee, meats, &c., and also the following fixtures in said store, consisting of counters, show cases, iron safe and two National cash registers, and all debts due the parties of the first part as well as all open accounts."

"All that certain tract or parcel of land lying, being and situate in Darvils Magisterial District, in the County of Dinwiddie and State of Virginia, known as Darvills tract, containing two hundred and one (201) acres, being same, more or less, situated on the Cryer's Road, and bounded as follows: On the north by Butterwood Road and the lands of G. E. Eckles, on the east by the lands of Heartwell and Pompey Mosley, on the south by the lands of the Baptist Parsonage and the lands of P. H. Thomas, and on the west by the lands of J. T. Vaughan and Butterwood Road, the land hereby conveyed being the same that was conveyed to the said R. Crawley Jones from Robert E. Blakey and wife by deed dated February, 20, 1909, this property being subject to a deed of trust given by the said parties of the first part to Robert E. Blakey or his trustee, James M. Quicke, Jr."

in trust to secure to the said Claude M. Dean, the holder thereof, the payment of four certain notes aggregating the sum of $1,600.00 and for the respective sums of $100.00, $500.00, $500.00 and $500.00, made and executed by the said R. Crawley Jones and endorsed by the said R. Crawley Jones and Marie E. Jones, his wife, each of said notes being dated September 1, 1909, and payable seven, thirty, sixty and ninety days, respectively after said date, with interest. All of which will more fully appear from a copy of said deed, herewith filed, marked "Exhibit A," and prayed to be taken and read as a part of this bill.

(7) Sixth. Your orator further shows that, although said deed of trust is dated the "3rd day of September," 1909, and purports to have been executed and acknowledged by said grantors on the same day, the fact is that said deed of trust was neither executed nor acknowledged before the notary public taking the acknowledgment until the 10th day of September, 1909, seven days thereafter; that the four notes mentioned in said deed of trust, and

intended to be secured thereby, represented the sum used by the said Claude M. Dean in taking up and getting out of the possession of said bank the bogus notes, so to speak, held by said bank; that the said Claude M. Dean knew, or had reasonable cause to believe, at the time of his interview with the said J. Samuel Jones in the City of Richmond, Virginia, as aforesaid, to-wit, on September 1. 1909, at the time said bogus notes were gotten out of the possession of said bank, to-wit, on September 3, 1909, and at the time of the execution and delivery of said deed of trust, to-wit, on the 10th day of September, 1909, that the said R. Crawley Jones was insolvent. Although an inspection of the books of account of said R. Crawley Jones on September 1st, 3rd and 10th, 1909, would have plainly shown him indebted to various merchants in large amounts for merchandise sold and delivered for the conduct of said general merchandise business at the time being conducted by him as aforesaid, yet the said Claude M. Dean utterly failed to make any examination thereof for himself or get from the said R. Crawley Jones any statement as to the value of his assets or the amount of his liabilities, or even request such information of the said R. Crawley Jones.

Seventh. And your orator further shows that the said Claude M. Dean knew or had reasonable cause to believe (8) that it was the intention and purpose of the said R. Crawley Jones, by the execution and delivery of said deed of trust, to prefer him, the said Claude M. Dean, over the other creditors of the said R. Crawley Jones, and said deed of trust was executed by the said R. Crawley Jones and Marie E. Jones, his wife, with that express purpose and intention, and the effect of the said deed of trust was to give to the said Claude M. Dean a greater percentage of his debt than other creditors of the same class.

Eighth. As will be seen from the copy of said deed of trust, the same embraced and covered not only the stock of merchandise in the storehouse of the said R. Crawley Jones at or near Darvills, Virginia, but also the fixtures in said storehouse, his household and kitchen furniture, live stock, growing crops of corn and tobacco, store account due him and his equity in a certain tract or parcel of land in Dinwiddie County, Virginia. In other words, the said deed of trust covered and embraced practically all his property, real and personal, of every kind and description. According to the terms of the said deed of trust, default in the payment of any one of the notes secured thereby would render all of the said notes due and

payable. All of the notes were dated September 1, 1909, and the first note was payable seven days after said date, and since said deed of trust was not executed until September 10, 1909, it will be seen that at the time of the execution and delivery of said deed of trust the first note secured thereby had been past due for two days, so that, under the terms of the said deed of trust, all of the said notes secured thereby were then due and payable. The said deed of trust was recorded in the clerk's office of the Circuit Court of Dinwiddie County, Virginia, on the 11th day of September, 1909, which was Saturday, and on that day, E. C. Dean, the trustee named in said deed of trust, (9) was directed by his son, the said Claude M. Dean, the beneficiary in said deed, to take charge of the property covered by said deed of trust, and on September 13, 1909 (Sunday intervening), the said E. C. Dean took possession as directed by said Claude M. Dean and proceeded to dispose of the property, the said deed of trust providing for a private sale by said trustee.

Ninth. And your orator further shows that the said R. Crawley Jones was, on the 3rd day of September, 1909, the date of said deed of trust, and on the 10th day of September, 1909, the real date of the execution and delivery of said deed of trust, and for several months prior thereto, indebted to numerous unsecured creditors in amounts aggregating over the sum of $6,000.00, which said sum of $6,000.00 did not include the amount of the said notes held by said bank, amounting to about $1,600.00; that at the first meeting of the creditors of said bankrupt, held before George S. Bernard, referee in bankruptcy, as aforesaid, debts of unsecured creditors aggregating over $5,000.00 were duly proven before and allowed by said referee; that by far the larger part of said debts so proven before said referee were for merchandise sold and delivered to said R. Crawley Jones for the conduct of the general merchandise business being conducted by him, and a large part of said merchandise was in the storehouse used by said bankrupt and in which he conducted a general merchandise business located at or near Darville, Dinwiddie County, Virginia, at the date of the execution and delivery of the said deed of trust of September 3, 1909, to-wit, on the 10th day of September, 1909, and the same was embraced in and covered by said deed of trust.

Tenth. And your orator further shows that the said bankrupt surrendered property of very small, if any, value. The property listed in his schedules of assets filed by him, not including the sum $1,632.97 held by W. P.

(10) Wells, trustee, hereinafter more fully mentioned, consisted only of certain store accounts, aggregating the sum of $193.76, of which very few, if any, are collectible, five shares of stock of the Bank of Scottsburg, Scottsburg, Va., of the par value of $250.00, and on which the said bankrupt has secured a loan of $250.00, practically its market value, two cash registers valued at $150.00, and certain wearing apparel and household goods. The wearing apparel and household goods were claimed as exempt under the Poor Debtor's Law of Virginia. (V. C. Sec. 3650.)

Eleventh. Your orator further shows to the court that by the terms of a certain written agreement, made and entered into on the 18th day of September, 1909, between Bartlett Roper, Jr., attorney for certain creditors of the said R. Crawley Jones, and Claude M. Dean, the beneficiary under said deed of trust, it was agreed that the said E. C. Dean should resign as trustee in said deed of trust and the said W. P. Wells should be substituted as trustee in his place and stead, and that the said W. P. Wells should dispose of the property embraced in said deed of trust and deposit the fund realized therefrom on certificate of deposit to await the decision of the United States courts as to the validity of said deed of trust of September 3, 1909. All of which will more fully appear from copy of said agreement herewith filed, marked "Exhibit B," and prayed to be taken and read as a part of this bill. That, in accordance with said agreement, the said E. C. Dean, resigned as trustee in said deed of trust, and the said W. P. Wells was by an order entered by the Circuit Court of Dinwiddie County, Virginia, on the 21st day of September, 1909, duly substituted as trustee in the place and stead of the said E. C. Dean; that the said W. P. Wells at once qualified as such substituted trustee and (11) proceeded to make sale of the personal property and collect the store accounts embraced in and covered by said deed of trust. The said W. P. Wells, substituted trustee, disposed of all the personal property embraced in said deed of trust, with the exception of the household and kitchen furniture and certain store accounts aggregating about $400.00, and realized therefrom the net sum of $1.632.97, which said sum was placed on certificate of deposit by said substituted trustee, as per agreement. The household and kitchen furniture and store accounts, not disposed of by the said W. P. Wells, substituted trustee, were, contrary to the terms of a certain agreement between the said R. Crawley Jones and the said Bartlett

Roper, Jr., attorney, under the advice of the said Claude M. Dean, turned over by him to the said R. Crawley Jones, who has since that time disposed of practically all of the household and kitchen furniture and collected practically all of the good accounts.

Twelfth. Your orator further shows to the court that on the 6th day of December, 1911 by consent of the said Claude M. Dean and the said Bartlett Roper, Jr., attorney for your orator and sundry creditors, an order was entered by this Honorable Court, directing, among other things, that the said W. P. Wells, substituted trustee under said deed of trust, settle his accounts as such trustee as required by law, and deposit the balance found in his hands on such settlement on certificate of deposit in the National State & City Bank, of the City of Richmond, Virginia, payable to the order of this court in the matter of R. Crawley Jones, Involuntary Bankrupt; and the said substituted trustee was further directed by said order to deliver said certificate of deposit of said bank to Joseph P. Brady, clerk of this court, to be held by said clerk to await (12) the decision of the United States courts as to the validity of said deed of trust of September 3, 1909. The said W. P. Wells, substituted trustee, as directed by said order, settled his accounts as such trustee, in the manner required by law, and on such settlement it was found that there was in the hands of said substituted trustee the sum of $1,634.00, which said sum was by said substituted trustee placed in said bank on certificate of deposit and said certificate delivered to said Jos. P. Brady, clerk, as directed by said order.

Your orator is advised that said deed of trust of September 3, 1909, is void and of no effect as to the other creditors of said R. Crawley Jones, since, at the time said deed of trust was executed and delivered, and for some time prior thereto, the said R. Crawley Jones was insolvent; since said deed of trust was executed by the said R. Crawley Jones with the intent on his part to prefer the said Claude M. Dean over his other creditors of the same class; since the effect of said deed of trust was to enable the said Claude M. Dean to collect a greater percentage of his debt than other creditors of the same class; and since said Claude M. Dean knew or had reasonable cause to believe that the said R. Crawley Jones intended, by the execution and delivery of said deed of trust, to prefer him, the said Claude M. Dean, over his other creditors of the same class.

In tender consideration whereof, and for as much

as your orator is remediless in the premises by the strict rules of the Common Law and cannot have adequate relief save in a Court of Equity where matters of this and a similar nature are properly cognizable and relievable.

Your orator prays—

I.

That the said deed of trust, executed and delivered by the said R. Crawley Jones and Marie E. Jones, his (13) wife, dated September 3, 1909, and recorded in the clerk's office of the Circuit Court of Dinwiddie County, Virginia, on the 11th day of September, 1909, be annulled, vacated, set aside and declared void, as having been made by the said R. Crawley Jones with the intent to prefer the said Claude M. Dean over his other creditors of the same class.

II.

That the sum of $1,634.00, the amount deposited by the said W. P. Wells, substituted trustee, on certificate of deposit in the National State & City Bank, Richmond, Virginia, realized by him from the sale of certain property embraced in and covered by said deed of trust and from the collection of certain store accounts, be declared the property of the estate of the said R. Crawley Jones, Bankrupt, and free from the lien of said deed of trust.

III.

And that your orator may have such further and other relief and decree in the premises as to the court may seem proper and required by the principle of equity and good conscience.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, directed to the said defendants, Claude M. Dean and W. P. Wells, substituted trustee, and to such others as shall in the discretion of your Honor appear necessary to the hearing and determination of this case, commanding them on a day certain to appear and answer unto this Bill of Complaint and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience, but answer under oath is hereby expressly waived as to each of them.

R. BEALE DAVIS, JR.,
Trustee in Bankruptcy Est. R.
Crawley Jones, Bankrupt.

ROPER & DAVIS,
Attorneys.

(14) STATE OF VIRGINIA,
City of Petersburg, To-wit:

This day personally appeared before me, M. H. Bird, a notary public in and for the City of Petersburg, in the State of Virginia, R. B. Davis, Jr., trustee in bankruptcy of the estate of R. Crawley Jones, whose name is signed to the foregoing bill, and made oath before me in my said city that the statements contained in the foregoing bill signed by him are true to the best of his knowledge and belief.

Given under my hand this 1st day of March, 1912.

M. H. BIRD,
Notary Public.

EXHIBIT "A".

Filed with Complainant's Bill.

This Deed made this 3rd day of September, 1909, between Robert Crawley Jones and his wife, Marie E. Jones, both of the County of Dinwiddie, at Darvils, Virginia, parties of the first part, and Edward C. Dean, Sr., of the City of Petersburg, Va., party of the second part.

Witnesseth: That said parties of the first part do grant unto the said party of the second part the following property, to-wit: all the household goods and furniture now contained in the house of the said parties of the first part at *Darvil*, Va., Dinwiddie Co., as follows:

One (1) walnut bed room suit, consisting of ten pieces, viz., wardrobe, bed, bureau, washstand, center-table, four chairs and rocker; one (1) mahogany parlor suit, consisting of six (6) pieces, viz., divan, two charis, one table and two rockers; two (2) bed room suits, consisting of two dressers, two washstands and two iron beds; one dining room suit, consisting of one extension table, sideboard, one china closet, twelve chairs; one kitchen set, consisting of one store, one safe, one kitchen *cabin*, one table; two sets of toilet, one refrigerator; one hall suit, consisting of one hall rack, one table and one chair, one chiffonier, one settee or divan and two chairs, one stool also in dining room, and one leather couch, and the following live stock, consisting of two cows, one yearling and nine head of hog, contained on the property of the said parties of the first part; and all and singular the crops of corn and tobacco now on the land and property of the said parties of the first part, in the County of Dinwiddie, Va., and the tobacco now cut and at present on the premises of the said

parties of the first part, and all other corn and tobacco on the said premises; and all and singular the goods, the stock of goods and merchandise now in the store of the said parties of the first part, located at Darvill, in Din-
(6) widdie County, Va., consisting of dry goods and notions, boots, shoes, hats, caps, druggist sundries, hardware and groceries, which latter consists of lard, sugar, coffee, meats, &c., and also the following fixtures in said store, consisting of counters, show cases, iron safe and two National cash registers, and all debts due the parties of the first part as well as all open accounts."

The said parties of the first part do grant, sell and convey unto the party of the second part the following land with the improvements thereon the following being description of said land and improvements:

"All that certain tract or parcel of land lying, being and situate in Darvils Magisterial District, in the County of Dinwiddie and State of Virginia, known as Darvills tract, containing two hundred and one (201) acres, being same, more or less, situated on the Cryer's Road, and bounded as follows: On the north by Butterwood Road and the lands of G. E. Eckles, on the east by the lands of Heartwell and Pompey Mosley, on the south by the lands of the Baptist Parsonage and the lands of P. H. Thomas, and on the west by the lands of J. T. Vaughan and Butterwood Road, the land hereby conveyed being the same that was conveyed to the said R. Crawley Jones from Robert E. Blakey and wife by deed dated February 20, 1909, this property being subject to a deed of trust given by the said parties of the first part to Robert E. Blakey or his trustee, James M. Quicke, Jr.

In Trust to secure the holder of the hereinafter described four (4) notes (now held by Claude M. Dean, of Richmond, Va., for cash money loaned the said parties of the first part by the said Claude M. Dean) amounting to sixteen hundred dollars and interest, which notes are as follows: all being dated Sept. 1, 1909, and payable to "Myself" and signed by R. C. Jones & endorsed by R. C. Jones & Marie E. Jones & payable at seven, thirty, sixty and ninety days after date & numbered 1, 2, 3, & 4, respectively, & being for the following amounts: No. 1 is for ($100) one hundred dollars & the remaining three, viz.: No. 2, 3 and 4 being for ($500) five hundred dollars each, all being dated at Petersburg, Va., & payable at the Virginia National Bank, Petersburg, Va.

(16) In the event that default shall be made in the payment of any of the above mentioned notes as they become due & and payable, then all of said notes shall become due & payable, and then the said party of the second part as trustee on being so required so to do by the said Claude M. Dean, the present holder of said notes or any subsequent holder or his or their executors, administrators or assigns shall sell the property hereby conveyed.

And it is covenanted and agreed between the parties aforesaid, that in case of a sale the same shall be made at the best price obtainable either privately or publicly in so far as the personalty, crops, fixtures & household goods, stock of goods, &c., are concerned & the realty after one week's notice of said sale in some newspaper published in Petersburg, Va., or as required by law & upon the following terms, to-wit: For cash as to so much as may be necessary to pay said above mentioned notes amounting to sixteen hundred dollars & as may be necessary to defray the expenses of executing this trust, including a trustee's commission of five per centum, and to discharge the amount of money then due payable on said notes; and if there be any residue of said purchase money the said trustee shall return the same to the parties of the first part.

The said parties of the first part covenant to pay all taxes, assessments, dues, & charges upon the said property hereby conveyed so long as they or their heirs or assigns shall hold the same: and further covenant and agree to keep the buildings on the property hereby conveyed, as well as the stock of goods & household goods, crops, &c., likewise conveyed insured for the full amount of sixteen hundred dollars for the further protection of the said party of the second part & the holder of said mentioned notes & in the event of the failure to do so, the trustee or the beneficiary under the deed, may effect or renew such insurance from time to time, so long as said debt or any part thereof remains unpaid & the insurance premiums shall constitute a part of the lien created by this deed, to be paid out of the proceeds of the property, if sold, or to be recoverable by all the remedies in law or equity by which the debt aforesaid may be recoverable.

If no default shall be made in the payment of either of the above mentioned notes, insurance premiums, then upon the request of the parties of the first part, a good & sufficient deed of release shall be executed to the parties

of the first part at their own proper costs and charges.

Witness the following signatures and seals.

ROBERT CRAWLEY JONES, [Seal]
MARIE E. JONES. [Seal]

STATE OF VIRGINIA,
County of Dinwiddie, To-wit:

I, W. P. Wells, a notary public in and for the county aforesaid, in the State of Virginia, do certify that Robert Crawley Jones and Marie E. Jones, whose names are signed to the foregoing writing, bearing date on the third day of September, 1909, have acknowledged the same before me in my county aforesaid. All erasures and interlineations & changes are acknowledged to have been made before the said parties signed the same.

Given under my hand this 3rd day of September, 1909.

W. P. WELLS, N. P.

My commission expires Nov. 1st, 1911.

VIRGINIA:

In the Clerk's Office of Dinwiddie Circuit Court, September 11th, 1909.

This deed of trust from Robert Crawley Jones & wife to Edward C. Dean, Trustee, was this day lodged in the said office and with the certificate annexed admitted to record at 11 o'clock A. M.

Teste:

A. M. ORGAIN, Clerk.

A Copy—Teste:

A. M. ORGAIN, JR., D. C.

(17) **EXHIBIT "B".**

Agreement between Claude M. Dean and Bartlett Roper, Jr., Attorney for Creditors of R. C. Jones.

Filed with Bill of Complaints.

Sept. 18, 1909.

It is this day agreed between Claude M. Dean and Bartlett Roper, Jr., Attorney for Petersburg creditors of

R. C. Jones, that Ed. C. Dean, Trustee, named in D. T. from R. C. Jones & wife, dated Sept. 3rd, 1909, is to design as trustee & W. P. Wells is to be substituted as trustee in his place with all the powers and without prejudice to the rights of the said Claude M. Dean & the creditors of R. C. Jones. It is further agreed that said W. P. Wells is to deposit all funds that come into his hands in some bank on certificate to await the decision of the U. S. Courts as to the validity of a certain deed of trust from R. C. Jones & wife dated Sept. 3rd, 1909, securing $1,600 & int. recorded Sept. 11, 1909, or may be paid over on mutual agreement of the said Claude M. Dean & Bartlett Roper, Jr., attorney as aforesaid. It is further understood that in the event said Deed of trust is declared invalid, the said Claude M. Dean to have the right to share in all funs in the hands of the substituted trustee (W. P. Wells) realized from sale of all goods, land, etc., under said D. T. or any other funds of said R. C. Jones from any source as a general creditor. It is further agreed that said E. C. Dean, trustee, is to be paid his expenses so far incurred by him as trustee.

(Signed) CLAUDE M. DEAN,
BARTLETT ROPER, JR., Atty.

(18) **EXHIBIT:—"Testimony of Claude M. Dean."**

Filed as Exhibit to Bill of Complaint.

CLAUDE M. DEAN, after being duly sworn, testified as follows:

EXAMINED BY MR. ROPER:

Q. Your name is Claude M. Dean? A. Yes, sir.

Q. Mr. Dean, you are the beneficiary in a certain deed of trust from R. Crawley Jones and wife to Edward C. Dean, Sr., trustee, dated September 3, 1909, are you not? A. Yes, sir.

Q. That deed of trust secured payment of four notes aggregating sixteen hundred dollars and interest? A. Yes sir.

Q. Did you loan Mr. Crawley Jones the sixteen hundred dollars? A. Yes, sir.

Q. At the time, Mr. Dean, I saw you in the City of Petersburg at the Virginia National Bank, which was on the 3rd day of September, 1909; did you know at that time of what purpose this sixteen hundred dollars was

borrowed by Mr. Crawley Jones? A. Not exactly. I knew it was to prevent some criminal prosecution; what the exact prosecution was at that time I did not know.

Q. Did you not on the 3rd day of September, in company with Mr. J. Samuel Jones, father of R. Crawley Jones, pay to the Virginia National Bank certain obligations of R. Crawley Jones? A. I did—Directly, I did not; indirectly, I did. I turned over the sixteen hundred dollars to Mr. Jones' father at Mr. Jones' direction, in accordance with my agreement to loan him sixteen hundred dollars, and Mr. Jones' father then paid the bank some two thousand and odd dollars, having put some money to the sixteen hundred dollars.

Q. Then you knew on the 3rd of September, 1909, the purpose for which the money, the sixteen hundred dollars, was borrowed, or if you did not know the purpose, you knew the purpose for which the money was applied? A. After it was loaned.

Q. Did you not yourself hand the currency to the Cashier of the Virginia National Bank? A. I handed it to Mr. Jones, who was standing at the time between me and the Cashier, he doing the paying at the direction of his son.

Q. Did you not go to another bank in the City of Petersburg with J. Samuel Jones and pay at that bank a (19) certain obligation for R. Crawley Jones A. I went to Petersburg on the understanding that Mr. Jones would meet me at a certain time and having gotten into the city before that time I went to the bank to inquire and I met Mr. Jones at the train and he went to another bank and paid that bank three hundred dollars, I think. I wont be certain as to the amount.

Q. Were you not in Petersburg most of the morning and did Mr. Samuel Jones arrive until late in the afternoon? A. I was in Petersburg during the morning to raise this sixteen hundred dollars, that I agreed to loan Mr. Jones; therefore I was in the city before Mr. Jones' father came back. Mr. Jones had brought me a note from his son on September 2nd. I have a copy of it here and can step across the way and get the original.

By Mr. HANSON:

Q. Why don't you produce it at this time? A. To Court: I would like to request in order to prevent any criminal prosecution of Mr. Jones in the State Court, that this paper be allowed to be returned. I think that has

to be mentioned at the time in order to protect the prisoner if there is a prosecution hereafter.

By Mr. ROPER:

I call for the original letter to be filed as a record of this court.

By Mr. HANSON:

We ask to be allowed to withdraw the original; you can see it any time you want to.

WITNESS: (Reading letter of September 1, 1909, from Mr. Jones.)

Darvils, Va., Sept. 1st, '09.

Dear Claude:

I am in serious trouble and need your help at once badly, being charged with a very grave offense under the law and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600.00 in cash I will be saved, so for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give (20) you notes for the amount, and a deed of trust on everything I have or possess to secure you. All I need is a little time, for I have enough to more than pay you five times over again. It is absolutely necessary I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes inclosed for the amount and as soon as you prepare deed of trust I will sign same.

Sincerely yours,

R. C. JONES,

He sent this note to me by his father. I did not have sixteen hundred dollars in cash, so I told Mr. Jones to go back and tell his son that I could raise it by tomorrow and he said he thought possibly it might have to be done at once or the banks were going to have something to do with it, and I said tell your son I will loan the money and go back and ask the bank if it will be all right if Mr. Jones

borrowed by Mr. Crawley Jones? A. Not exactly. I knew it was to prevent some criminal prosecution; what the exact prosecution was at that time I did not know.

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pays the money tomorrow afternoon and if the bank agreed to that to wire me to meet him in Petersburg at 6 o'clock. I got a wire which intimated to me that the bank would not prosecute or take criminal proceedings until the following afternoon. I met his father the next afternoon at six o'clock in accordance with his telegram, which I understood afterwards was prepared by the teller of the bank. I went as far as the train to meet him and told him I had the money and he said he had gotten hold of some more money and he would settle it up at the bank; that his son had given directions about it; and I went to the bank; I do not know the names of the officers; and he paid one about three hundred dollars, is my recollection, and the other over two thousand dollars. I then told him to tell his son to come to Richmond the next day in order to prepare and sign the deed. He said that it was the season of the year that he should cut his tobacco at once, and if he did not do it, the tobacco would go for naught, and it would be best, if it was a clear day the next day, to let his son come a few days afterwards.

By the COURT:

Q. When did that conversation take place? A. After the money transaction. Immediately on returning to Richmond I prepared the deed of trust, leaving the stock, &c., blank and dated it the 3rd of September. On the following Friday I went up to his farm to get him to sign the deed of trust in accordance with his letter to me. At (21) his home I filled in the blanks, naming the different things conveyed. I had already prepared not only the deed in blank and certificate, and left only a blank for the notary to sign his name, and when he told me Mr. Wells was coming to take the acknowledgment I wrote his name in and that is the only thing I wrote in the notary's certificate. Mr. Wells asked me if the certificate was all right and I said yes. overlooking that I had not changed the date of the certificate because I had made out the certificate on the day I made the deed, the 3rd of September. As soon as I found it out I wrote Mr. Wells telling him that it was an inadvertence.

Q. The deed was dated the 3rd of September and acknowledged on the 10th of September? A. I told him it was an imadvertence.

Q. It was actually signed on the 10th? A. The understanding being that it was in accordance with the transaction of the 3rd inst.

Q. And the conclusion of the papers was on the 10th? A. Yes, sir.

By Mr. ROPER:

Q. Then you did know on September 3rd, the day you were in Petersburg, that the sixteen hundred dollars was money paid to take up notes held by two banks in Petersburg? A. I did not know that it was to be used in payment of notes. I knew it was something in connection with a note or check, whether it was a note or check or what, I did not know what it was until Mr. Jones' father came to the city, in spite of the fact that I had talked with the cashier, except that he had used the word forgery and I asked him while Mr. Jones was there "Why didn't you take a deed of trust from Mr. Jones?" And he said: "We do not own the notes but the people we are collecting them for want cash money. Mr. Jones has plenty to pay everybody, but these people want cash money." He said: "I have been up there and seen his place and it seems to me he had enough to pay everybody. The people I am collecting the notes for are demanding cash money."

Q. You did know that it involved the loan of sixteen hundred dollars of debts at that time? A. I knew that it involved something which necessitated sixteen hundred dollars in cash in order to prevent criminal proceeding but exactly what I did not know.

Q. How many notes were outstanding? A. About twenty-three or twenty-four hundred worth.

Q. The money was actually used to take up the notes? A. Yes, sir; it was eventually used for that purpose.

(22) Q. On the 3rd day of September were not these notes turned over to you by the bank and didn't you hold these notes for some time? A. Mr. Jones' father told me that his son told him to get me to take charge of the notes and I said I would take charge of them and he said yes if there is any question about paying them you had better hold them to show you loaned the money.

Q. Then at the time you paid this money or about the time you paid this money, certain notes were turned over to you by the bank, were they not? A. Turned over to Mr. Jones' father and by his father to me.

Q. You were present when this was done? A. Yes, sir.

Q. Did you go to the office of W. W. Preston and pay

him a note? A. The firm of W. W. Hines & Company. I know nothing about that.

Q. At the time you say you loaned this money to Mr. Crawley Jones on what property was he to give you the lien? A. In his letter to me he said: "If I can get hold of sixteen hundred dollars cash, I will be saved, and for God sake, &c. If you will do this I will give you notes for this amount and a deed of trust on everything I possess to secure you." So I accepted the deed of trust in accordance with his letter to me, on which letter I loaned him the money.

Q. A deed on everything? A. In accordance with his letter.

Q. Did you make any inquiry as to the financial condition of Mr. Crawley Jones as to whether he owed anything on his stock of goods he had at Darvills you took the deed of trust on? A. Mr. Jones' father informed me that his son was working for Mr. Jones, the alleged bankrupt, and he said his debts were comparatively small and I also talked the matter over with the cashier of the bank who said he had been up there and seen the place and Mr. Jones had apparently enough to pay all the debts he owed.

Q. Did you ask Mr. Crawley Jones anything about how much he owed on this stock? A. I did not see him. I did not ask Mr. Crawley Jones anything about it because of the fact that he was threatened with a criminal prosecution by certain parties and he was then hiding and he was unable to see me and the transaction was through his letter and through his father. He was afraid to come to Richmond or Petersburg because the bank people had threatened to have him arrested and in that way I was unable to see the grantor in person, but I had been informed that he had a very large farm and had a big crop; that he had a corn crop worth over five hundred dollars.

Q. Did Mr. Crawley Jones ever tell you anything about a meeting of his creditors in the city of Petersburg? A. Not until after it had taken place.

(23) Q. Was that before the deed was executed? A. After the deed was executed. I had not seen Mr. Jones until after the following week after he had executed the deed on his place.

Q. Did you write to Mr. J. Samuel Jones, the father of Crawley Jones, to give you any statement in writing as to the condition of his son? A. I did not ask him to give me any statement, but I asked him about what was the condition of his son. He told me he had a tobacco crop worth three or four hundred dollars and a corn crop

worth more than five hundred dollars and a large stock of merchandise on which there was very little due, he thought, and he owned the farm on which there was a mortgage, and that he had plenty to pay everybody.

Q. Then you relied upon what Mr. J. Samuel Jones told you and did not make any other investigations in the matter? A. I relied on what the cashier of the bank in Petersburg told me and the father of the alleged bankrupt told me and my knowledge that he had a large farm which I understood he had paid for.

Q. Did you take the precaution to call for his books or make any examination of his affairs to find out how he stood? A. I did not because of the fact that these proceedings were threatened and unless the money was raised immediately that he would be prosecuted and arrested, and in order to prevent the prosecution the money had to be loaned at once, and his father told me if he was arrested his business would be wrecked and lost to everybody.

Q. Why did you make one of the notes payable in seven days? A. Well, I thought that as the man had to borrow the money he wanted to make the first payment very small and in a very short time. The first note was made seven days. Mr. Jones, when he sent the letter to me, sent the notes, and they were dated September 1st, and when I went up there I had no idea of his being in embarrassed circumstances for if I had I would have rushed off on the first train. So the first time I could get away from my business, I went up there, and that being the 10th of September, one of the notes would have matured, but, that being about Thursday or Friday, Mr. Jones and myself agreed to extend that note until Saturday, September 11th, on which day he expected some accounts to be paid, and would pay the first note on Saturday, the 11th; and the note not being paid on that day I wrote the trustee to take charge of the property and he had charge of the property on the following Monday, September 13th. The trustee being the father-in-law of the alleged bankrupt found the duties such that they would be disagreeable to him and wrote me that he would like to resign as he did not like to be put in the embarrassing position of selling his son-in-law out, and I afterwards saw Mr. (24) Roper and at his suggestion agreed on a substitute, Mr. Wells, a man of very high character, and therefore upon my request Mr. Wells was substituted trustee and immediately took charge of the property for Mr. Dean, the former trustee.

Q. Then when the deed of trust was really executed the first note was due and according to the terms of the deed all of the notes became due? A. As I said, the first note was extended three days but the deed having been prepared there was no change made in the deed. We talked over the matter. One part of the deed is that the trustee whenever required so to do by the beneficiary shall take charge of the property, &c.; and agreeing with Mr. Jones to extend the time three days and that I would not direct the trustee to take charge until the expiration of that time, and the note was not therefore matured until after the seven days,—three days after the deed was executed, nevertheless it was extended, though upon the face of the deed it would appear that way.

Q. Then the trustee took charge under your direction three days after the deed had been executed, is that correct? A. The deed was recorded on September 11th, and on that day he was directed to take charge and that being Saturday he took charge on Monday, which is practically three days, Sunday intervening.

CROSS EXAMINATION.

By MR. HANSON:

Q. These notes which you paid off at the banks, the various notes were among these notes that criminal proceedings might be brought upon? A. The notes that Mr. Jones' father paid. Yes.

Q. Had you ever been at Mr. Crawley Jones' house? A. I had never been to the house since they moved to the country. I visited his house several times in Petersburg.

Q. How long was he married to your sister? A. I think four years.

Q. How many times have you seen him during that four years? A. Possibly half a dozen times.

Q. Do you know anything about his affairs whatsoever during that four years except what you have stated on the stand? A. I knew nothing positively except apparently he was in a prosperous condition; his house prettily furnished, his children dressed well and his wife well dressed and apparently in a very prosperous condition and when I went to his country home up there to a city man he seemed to be very prosperous; beautiful country home. He took me all over the farm and we walked for over an hour—it was the first tobacco I had ever seen (25) growing and it seemed to me a tremendous crop

and likewise the corn; and I was told at that time his tobacco was worth anywhere from three to five hundred dollars and the corn five to six hundred dollars and he estimated at least one hundred barrels.

Q. When was that? A. September 9th. After the money had been loaned.

Q. As far as you know the contents of that letter which he had written to you were absolutely true? A. As far as I knew the contents of his letter were absolutely true, and I was thoroughly convinced of it as soon as I got up there and saw everything, and I would not have included so much in the deed of trust except that I thought it best to carry out the agreement contemplated, which was to give a deed of trust on everything—knowing that everything would revert back to him after I was paid the sixteen hundred dollars; otherwise I would not have done so; and by agreement with counsel I agreed with opposing counsel representing creditors in Petersburg, and to assure them of my sincerity in the matter, that I wanted the estate to realize as much as possible and did not want any of it to be destroyed,—I agreed to let the trustee sell sixteen hundred dollars worth and keep the money until the court had decided whether or not my deed was a good deed, in order to protect the crops which I understood had to be given a certain amount of care and attention, owing to the climatic conditions; and when the trustee began to sell it was understood he should go ahead and sell the stock and let the furniture stay until the last thing, as it would possibly not be necessary to sell it. Counsel on the other side agreed with me, saying that these gentlemen he represented did not want to go into court and consume all the revenue in court expense and I suggested that we sell the things and there would be enough to pay everybody, and I think if it had been sold according to the usual course of business it would have been sufficient to pay everybody; and they finally thought so too; otherwise they would have rushed into the courts immediately.

Q. You had some talk with counsel for some of the petitioning creditors? A. A few days after my deed was recorded a committee, representing creditors, came to see me to see if some amicable arrangement could be made and I told them the only arrangements would be to let the money stand in the hands of the trustee until the court passed upon the validity of my deed and during that conference the creditors said they would accept fifty cents on the dollar and I said go ahead and sell for there certainly can be no doubt that you would realize more

than fifty per cent., and counsel told me: "No, if we proceed to sell we would not accept fifty cents on the dollar but will have to have our bills paid in full then."

(26) By Mr. Roper:

Q. Mr. Dean, at the time the notes were handed over to you by Mr. J. Samuel Jones as you have stated before, had these notes been marked paid by the bank? A. Some of them had; I think one was marked paid and one not, which was due to the fact that it was after banking hours, but I remember one, the first one went to, the stamp was put on it, and the time we went to the second bank the note was in the hands of the cashier in his office and not in the usual place and he just handed the notes to Mr. Jones; and they were all afterwards marked paid by myself.

Q. Were the notes which you paid at the Virginia National Bank marked with the stamp paid by the bank in any way? A. Which is the National Bank?

Q. It is the bank of which Mr. J. W. Long is Cashier? A. They were handed over to Mr. Jones and afterwards marked paid by myself. Mr. Jones gave them to me to keep.

Q. Didn't Mr. Long wait for you and Mr. Jones by appointment until six o'clock? A. Mr. Long wrote the telegram for Mr. Jones to let me know that he would be there at six o'clock, it being understood that no criminal prosecution would follow if they were paid the following afternoon and it was with that understanding that he waited at the bank and said no mention would be made of the matter at all.

By Mr. Hanson:

Q. The notes were given you as stated in the petition and secured by the deed of trust and the deed of trust was in no sense the security for the old notes paid by Mr. Jones? A. No, it was in no way security for the notes of Mr. Jones at the bank. It was the security for the money that I loaned Mr. Jones for which he gave me the deed of trust. I knew nothing about the purchase of the notes, They were paid by the direction of Mr. Jones. I loaned the money to Mr. Jones.

By MR. ROPER:

Q. If you were not looking to the notes for payment why did you not turn those notes over to Mr. Crawley Jones? A. Because Mr. Crawley Jones asked me to keep them in case anything developed afterwards to show that I had loaned the money so that there would be no possible doubt of my loaning him sixteen hundred dollars and to see that everything was done in a *bona fide*, proper way.

Q. Hadn't he before that time executed four notes aggregating sixteen hundred dollars, which was all the evidence of the loan you needed? A. No. People can some times say so and so loaned money but giving notes would not be positive evidence of it at all. This way I can show the way the money was used.

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ANSWER OF W. P. WELLS, TRUSTEE,

(27) Filed July 18, 1912.

THE ANSWER OF WILLIAM P. WELLS, TRUSTEE SUBSTITUTED IN THE PLACE AND STEAD OF E. C. DEAN, THE TRUSTEE NAMED IN A CERTAIN DEED OF TRUST EXECUTED BY R. CRAWLEY JONES AND MARIE E. JONES, HIS WIFE, DATED SEPTEMBER 3RD, 1909, TO A BILL IN EQUITY EXHIBITED AGAINST HIM AND CLAUDE M. DEAN IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA BY R. BEALE DAVIS, JR., TRUSTEE OF THE ESTATE OF THE SAID R. CRAWLEY JONES, BANKRUPT.

This respondent for answer to said bill or to so much thereof as he is advised that it is material for him to answer, answers and says:

It is true, as alleged in said bill, that this respondent resides in the County of Dinwiddie and Eastern District of Virginia.

It is also true, as alleged in said bill, that on the 10th day of September, 1909, the said R. Crawley Jones and Marie E. Jones signed and acknowledged the deed of trust set out in paragraph fifth of said bill.

It is also true, as alleged in said bill, that the said deed of trust was neither executed nor acknowledged by (28) the said R. Crawley Jones until the 10th day of September, 1909, one week after the same purports to have been signed and acknowledged. This respondent as a notary public for the County of Dinwiddie, Virginia, on September 10th, 1909, took the acknowledgments of the said R. Crawley Jones and Marie E. Jones to said deed of trust. At the time this respondent as a notary public signed the notary acknowledgment to said deed of trust the date had been put in. Just before this respondent signed said acknowledgment some one asked what was the date of the month and some one answered and stated that it was the 10th. I think Mrs. Marie E. Jones remarked that it was the 10th. Not noticing at the time that the acknowledgment was dated "September 3rd" and thinking that the acknowledgment contained the correct date since the date of the month had just been stated this respondent as a notary public inadvertently signed said acknowledgment, taking it for granted that said acknowledgment contained the correct date of the month. This respondent, as soon as he ascertained that the said notary acknowledgment to said deed of trust signed by

him did not contain the correct date of the execution of said deed of trust by the said R. Crawley Jones and Marie E. Jones, his wife, he at once wrote to the said Claude M. Dean in the City of Richmond, Virginia, and called his attention to the same, in the hope of being able to have same corrected.

It is also true, as alleged in said bill, that by a certain agreement entered into on September 18th, 1909, between Claude M. Dean and Bartlett Roper, Jr., attorney for certain creditors of the said R. Crawley Jones, it was (29) agreed that this respondent should be substituted as trustee in the place and stead of E. C. Dean, the trustee named in the said deed of trust of September 3rd, 1909, and he should proceed to dispose of the property embraced in said deed of trust and deposit the fund realized therefrom on certificate of deposit to await the decision of the United States Court as to the validity of said deed of trust. In accordance with said agreement the said E. C. Dean resigned as trustee in said deed of trust and this respondent was, by the order of the Circuit Court of Dinwiddie County, entered on September 21st, 1909, duly substituted as trustee in said deed of trust and at once qualified as such. As soon as this respondent had qualified he proceeded to make sale of the personal property and collect the store accounts embraced and covered by said deed of trust. This respondent disposed of all the personal property covered by said deed of trust with the exception of certain store accounts aggregating about $500.00 and certain household and kitchen furniture and realized therefrom the net sum of $1,632.97, which said sum was placed in the First National Bank, Blackstone, Virginia, on certificate of deposit as per said agreement. The store accounts and household and kitchen furniture not disposed of by this respondent were under the advice of the said Claude M. Dean, the beneficiary in said deed of trust, turned over by this respondent to the said R. Crawley Jones, but this respondent is not advised as to the disposition made of (30) said property by the said R. Crawley Jones. It is also true, as alleged in said bill, that on the 6th day of December, 1911, by consent of the said Claude M. Dean and Bartlett Roper, Jr., attorney for the said R. Beale Davis, Jr., Trustee, and sundry creditors, an order was entered by this Honorable Court directing among other things that this respondent settle his accounts as required by law and deposit the balance on such settlement on certificate in the National State and City

Bank, Richmond, Virginia, payable to the order of this Honorable Court in the matter of R. Crawley Jones, Involuntary Bankrupt, and deliver the certificate of said bank to the Clerk of this court to be held by said Clerk to await the decision of the United States Court as to the validity of said deed of trust of September 3rd, 1909. As directed by said order this respondent settled his accounts in the manner required by law and on such settlement it was found that there was in the hands of this respondent the sum of $1,634.00, which said sum was by this respondent placed in said bank on certificate of deposit and said certificate deliveed to said Clerk as directed by said order.

This respondent is not advised as to the truth or falsity of the other statements and allegations contained in said bill.

And now having fully answered the plaintiff's bill, this respondent prays to be hence dismissed with his reasonable costs by him in this behalf expended. And this respondent will ever pray, etc.

W. P. WELLS,
Substituted Trustee.

THE DEMURRER OF CLAUDE M. DEAN, DEFENDANT,

(31)

Filed May 4, 1912.

This defendant, not confessing any of the matters in the bill of complaint herein filed to be true, demurs to said bill and for causes of demurrer shows:

(1) That on the face of said bill of complaint it appears that the giving of the said deed of trust, dated the third day of September, 1909, by R. Crawley Jones, being insolvent, did not create a preference in favor of the defendant, Claude M. Dean.

(2) On the contrary on appeal taken from the decision of this Honorable Court holding the said R. Crawley Jones to be properly adjudged a bankrupt, to which appeal the creditors now represented by R. Beale Davis, Jr., Trustee, were parties as well as your demurrant, the United States Circuit Court of Appeals for this Circuit adjudged and held that the holders of the notes of the said R. Crawley Jones, mentioned in this bill of compiaint, which were deposited in the banks in the City of Petersburg, Virginia, or the banks themselves, if they were the holders of said notes, had received a preference as a result of the transactions set out in the bill of complaint in this case and not the demurrant, Claude M. Dean.

(32) In support thereof, your demurrant begs leave to call attention to the following language of the opinion rendered in said case: "Being so insolvent he (R. Crawley Jones) did prefer certain of his creditors who then held his notes which had been theretofore executed for value by him and were held by the banks in Petersburg, Virginia."

(3) As shown on the face of said bill of complaint the preference of the debts paid out of said proceeds received from the giving of the deed of trust, dated September 3rd, 1909, was not effected through the deed itself. Said deed did not create or secure any preference. The preference, if any existed, resulted from the subsequent application of said money; and the parties receiving said preference, as shown by the opinion of the Circuit Court of Appeals in this case, were the holders of the antecedent notes held in certain banks in the City of Petersburg, Virginia, and not your demurrant.

(4) It also appears on the face of said bill of complaint that said deed of trust, though given within four months before the filing of said petition, was given and accepted in good faith and not in contemplation of or in

fraud upon the Bankruptcy Act, and was given for a loan made at the time and was duly recorded according to law.

(5) Said deed of trust is not invalidated by the fact, alleged in said bill, that it was executed seven days after the loan was made by your demurrant to the said R. Crawley Jones for, as is shown on the face of said bill, your demurrant lived in the City of Richmond and the bankrupt lived in the County of Dinwiddie, and the uncontradicted evidence in the case of R. Crawley Jones *vs.* Aug. Wright Company and other creditors of the said Jones, further shows that said deed of trust, dated September 3rd, 1909, was given in pursuance of a prior valid promise, made at the time of the loan, to give the specific (33) security set out in said deed and that the promise was the sole inducement on which your demurrant made said loan.

(6) The mere fact, if such it was, that the bankrupt, R. Crawley Jones, intended to use the money borrowed thereon from your demurrant to pay other creditors, and that that fact was known to demurrant, does not thereby cause the giving of said deed of trust, dated September 3rd, 1909, to be an attempt to create a preference in behalf of your demurrant, Claude M. Dean.

(7) Whilst the said bill of complaint alleges that the proceeds, obtained by the bankrupt by the giving of said deed of trust dated September 3rd, 1909, were used by him to pay existing creditors, yet the said bill nowhere avers and charges that the said Claude M. Dean knew that such payment of existing creditors would work a preference, or that he was cognizant of the purpose of the said bankrupt to make such preference.

(8) The bill of complaint fails to show that there were any creditors of the said bankrupt in the same class with your demurrant. On the contrary, said bill expressly sets out that there were no creditors of the said bankrupt except general and unsecured creditors. The existence of such creditors of the same class is an indispensable prerequisite of a preference, otherwise inequality among creditors of the same class cannot ensue from the giving of said deed of trust.

Wherefore the judgment of the Court is prayed whether he shall be compelled to further answer said bill, and prays to be hence dismissed with costs.

WYNDHAM R. MEREDITH,
Solicitor.

I, Wyndham R. Meredith, a solicitor for defendants

in the above, do hereby certify that the foregoing de-
(34) murrer, in my opinion, is well founded in law.

WYNDHAM R. MEREDITH,
Solicitor.

I, Claude M. Dean, defendant in the above cause, being duly sworn, do say that the foregoing demurrer is not interposed for delay.

CLAUDE M. DEAN.

Sworn to and subscribed before me this the 3rd day of May, 1912.

R. E. POWERS,
Deputy Clerk U. S. District Court.

(35) **OPINION ON DEMURRER,**

Filed July 25, 1912.

This matter came on to be heard on 11th of June, 1912, upon the Bill of Complaint herein and the demurrer of the defendant, Claude M. Dean, thereto, and both parties appeared by Counsel and were heard.

At the time of the hearing it was stipulated between the Counsel that the letter from R. Crawley Jones to Claude M. Dean, dated September 1st, 1909, as set out on pages 38 and 39 of the printed transcript of record, No. 988, before the United States Circuit Court of Appeals for the Fourth Circuit, entitled R. Crawley Jones, Appellant, *vs.* Aug. Wright Company, et al., Appellees, together with the testimony of Claude M. Dean on pages 37, 38. 39, 40, 41, 42, 43, 44 and 45 of said record, showing that the said letter was received by said Claude M. Dean and answered by him on the dates and in the manner set out in said testimony, should be read as Exhibits to the Bill; the cause to be argued as if this letter and the matters in this testimony were set out in the Bill of Complaint for the purposes of a final argument on this demurrer, provided that the Complainants while admitting the writing and the receipt and answer of the letter in
(36) the manner stated, are not to be taken as admitting that the statements made in the letter were true.

From the Bill of Complaint and these papers the facts in the case would appear to be as follows:

R. Crawley Jones, the Bankrupt, was on the 1st of September, 1909, a brother-in-law of the defendant, Claude M. Dean, and engaged in farming and in a general merchandise business at or near Darville, Dinwiddie County, Virginia. On that date he wrote to his brother-in-law, the defendant, Claude M. Dean, the following letter:

Darvills, Va., Sept. 1st, 1909.

Dear Claude:—

I am in serious trouble and need your help at once badly, being charged with a very grave offense under the law and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600.00 in cash I will be saved, so for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give you notes for the amount, and a deed of trust on everything I have or possess to secure you. All I need is a little time, for I have enough to more than pay you five times over again. It is absolutely necessary that I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes enclosed for the amount and as soon as you prepare deed of trust I will sign same.

Sincerely yours,

R. C. JONES.

This letter was delivered to Mr. Dean on the 2nd of September, 1909, by Mr. J. Samuel Jones, the father of R. Crawley Jones. At the date of the letter there were (37) notes held by the Virginia National Bank of the City of Petersburg for about $1,600.00 (some of which were not yet due) purporting to bear the endorsements of certain persons, and these notes were among the notes referred to by R. Crawley Jones in the above mentioned letter to Claude M. Dean. Mr. Dean, upon the receipt of the letter told Mr. Samuel Jones to go back and tell his son he would grant the request of the letter and loan the money, that he would raise the money the next day, and asked Mr. J. Samuel Jones to wire him if the Bank would agree to payment then. Thereafter he got a telegram which intimated to him that the Bank would not prosecute or take criminal proceedings until the following afternoon. On the next day, 3rd of September, 1909, in the afternoon, Mr. Dean met Mr. J. Samuel Jones in Petersburg and went with him to the Bank and paid to Mr. J. Samuel Jones the $1,600.00, who paid it over to the Bank and received from the Bank the notes held by it. Mr. Dean then told Mr. J. Samuel Jones to tell Mr. R. Crawley Jones to go to Richmond the next day and sign the deed to secure the notes. To this Mr. J. Samuel Jones said that Mr. R. Crawley Jones should cut his tobacco at once; if he did not do it the tobacco would be ruined, and that it would be best that he should go to

Richmond a few days afterwards. Immediately on returning to Richmond on the 3rd of September, Mr. Dean prepared the deed of trust by way of mortgage to secure the notes, and on the following Friday went to Mr. R. Crawley Jones and had him sign the deed of trust by way of mortgage, which was done and acknowledged on the 10th of September, and thereupon the mortgage was recorded on the 11th September, 1909. The notes taken up from the Bank in Petersburg on the 3rd September, 1909, with the $1,600.00, were some of them not yet matured. These notes were when given up by the Bank delivered (38) into the possession of Claude M. Dean, who still holds them.

The mortgage or deed of trust was made to Mr. E. C. Dean, the father of the defendant, Claude M. Dean, and father-in-law of R. Crawley Jones. It secured four notes (the notes sent in the letter of 1st September, 1909), viz., for the respective sums of $100.00, $500.00, $500.00, $500.00. All the notes were dated the 1st day of September, 1909, and were payable respectively at 7, 30, 60 and 90 days after date; so that the first note for $100.00 had already matured on the 10th September, 1909, the date of the actual execution of the mortgage. The mortgage embraced practically all the property of R. Crawley Jones.

Mr. Claude M. Dean prior to the receipt of the letter to him knew nothing of the financial affairs of R. Crawley Jones and made no investigation or examination at the time beyond the statements of the Bankrupt in the letter dated 1st September, 1909, the statements of Mr. J. Samuel Jones, who said his son's debts were comparatively small, and a conversation with the Cashier of the Bank which held the notes, who stated he had seen the place of R. Crawley Jones, and he had apparently enough to pay all his debts.

The first note for $100.00 not having been paid at its maturity, Claude M. Deane on the 11th of September, 1909, directed the trustee, Mr. E. C. Dean, to take possession of the property covered by the mortgage which the latter did on the 13th September, 1909.

On the 18th September, 1909, by agreement the defendant, William P. Wells, was substituted as Trustee under the deed of trust in lieu of Mr. E. C. Dean. On the 24th of December thereafter a petition for involuntary bankruptcy was filed against R. Crawley Jones, on which he was subsequently on the 25th day of April, 1910, adjudicated bankrupt. It appeared on an investigation of (39) the Bankrupt's affairs that he was on the 1st Sep-

tember, 1909, and thereafter insolvent; that he owed more than $6,000.00 in addition to the notes held by the Bank and taken up by the $1,600.00. The substituted trustee, William P. Wells, disposed of all the property covered by the deed of trust which realized the sum of $1,634.00, which is held to await the result of this litigation, and practically represents the entire bankrupt estate.

The questions raised by the pleadings and stipulation, and argued on the trial were practically reduced to two, viz.,

1. Whether upon the facts stated Claude M. Dean was a pre-existing creditor at the time that this mortgage was given, and therefore it was given to secure a pre-existing debt within the period prohibited by the Bankrupt Act.

2. Whether, even if Claude M. Dean was not a pre-existing creditor, but a creditor taking a lien for present consideration, yet that the lien given in this case not having been given or accepted in good faith, but in contemplation of or fraud upon the Bankrupt Act, was therefore within the prohibition of Sections 60 and 67 of the Bankrupt Act.

With regard to the first question, the Court holds that on the 3rd of September, 1909, Claude M. Dean was not a creditor of the Bankrupt, R. Crawley Jones. On that day he advanced for the Bankrupt, R. Crawley Jones, the sum of $1,600.00 in pursuance and on the faith of an agreement on the part of R. Crawley Jones to give him a mortgage upon all his property to secure re-payment. This was a present valuable consideration, and the mortgage although actually executed a few days subsequent, was executed in pursuance of a direct promise made in consideration of a present actual sufficient val-
(40) uable consideration, and upon which the same was based, and was executed under circumstances so nearly in point of time as to be practically contemporaneous with the loan, and in the opinion of this Court it is therefore not a mortgage given by way of preference to a pre-existing creditor so far as Claude M. Dean is concerned, but a mortgage given for a present actual valuable consideration.

We come, then, to the next question, whether, assuming it was given for a present actual valuable consideration, it is void under Sect. 67 of the Bankrupt Act as being an incumbrance not having been given or accepted in good faith, but in contemplation of or fraud upon the Act.

the underlying principle of the Bankrupt Act in this

regard is to prohibit preferences among the creditors of an insolvent, whether secured directly or by indirection. If it be prohibited to give a valid mortgage to secure a creditor directly for an existing debt, but the same prohibition did not apply where the mortgage was given to a third party although the money was procured and used for the purpose of paying an existing debt, it is manifest that the provision of the Bankrupt Act in this respect might be easily evaded. A. owing money to B. and unable under the Bankrupt Act to give a mortgage which would prefer B., yet might, under the procurement of B. or of himself, give a mortgage to C. and take the money loaned by C. and apply it to B.'s debt. This would be in its result a preferring of the debt to B. and thus an evasion of the prohibition in the spirit of the Act. The payment to B. thus eventuating in result in a preference; two questions arise. Is the preference one to B. which he can be compelled to refund, or is the preference one to C. so as to invalidate his mortgage?

It is manifest that both cannot be treated as preferences as there is no reason why under the Statute the (41) Bankrupt estate should be augmented over its actual assets by a double recovery. If B. is compelled to refund then the mortgage should be allowed to remain. If the mortgage to C. is held invalid then B. should not be compelled to refund. If both B. were compelled to refund and the mortgage to C. were also held invalid the result would be to enrich the bankrupt estate by the amount advanced by C., a result evidently not intended by the Statute.

Whether or not the payment to the Bank was a preference which it should be compelled to refund is not before the Court on this hearing. The Bank is not a party to this proceeding. Whether or not the payment of the notes held by it constituted a preference under Section 60 of the Bankrupt Act may depend upon whether the Bank had reasonable cause to believe that it was intended thereby to give a preference. There being no allegation in the Bill of Complaint charging the Bank as a preferred creditor, and the Bank not being a party to this proceeding, it should for the purposes of the argument on this demurrer be treated as if the question of any liability on its part to refund under Section 60 was not before the Court, leaving only the question whether such being the case, the mortgage to Claude M. Dean is invalid under Section 67. The liens declared invalid under Section 67 are:

1. 67 a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt.

2. 67 C. Certain liens created by or obtained in or pursuant to any suit or proceeding at law or in equity including an attachment upon some mesne process or a judgment by confession.

3. 67 e. Conveyances, transfers, assignments or incumbrances made within four months prior to the filing (42) of the petition with the intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors; and all conveyances, transfers, or incumbrances made within the said four months, which are null and void as against creditors by the laws of the State, territory or District in which the property is situated.

4. 67 f. All levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the petition in bankruptcy against him.

In 67 e. there is an exception as to purchasers in good faith and for a present fair consideration, and by 67 d. it is declared that liens given or accepted in good faith and not in contemplation of or in fraud upon the Act and for a present consideration which have been recorded according to law if record thereof was necessary in order to impart notice, shall not be affected by the Act.

The language of 67 d. is not limited to Section 67, but covers the whole Act, and would therefore include attempted preferences under Section 60, but as the opinion of the Court is that when the mortgage was given Claude M. Dean was not an existing creditor, he would not come under the inhibitions of Section 60.

As this transaction was the giving of a deed of trust by way of mortgage which was duly recorded, it would not be any one of the liens referred to in 67 a, 67 c, or 67 f. So that if the lien is invalid it must be because it was given in contravention of 67 e, as being in incumbrance given by the Bankrupt with intent to hinder, delay or defraud his creditors, and which was accepted by Claude M. Dean not in good faith or in contemplation of or in fraud of the Act. The transfers prohibited by 67 e. are these fraudulent and voidable under the common law (43) meaning thereby the rules growing out of the Statute of 13 Eliz. and also such as constitute acts of Bankruptcy under Section 3 of the Bankruptcy Act.

Wright *vs.* Sampter, 152 Fed. Rep. 196.

In re Bloch, 142 Fed. Rep. 674.

The Bankrupt, R. Crawley Jones, it appears from the facts alleged, was insolvent at the time and so insolvent that he must be presumed to have known his condition. The Bank of Petersburg held notes of his upon which he was subject to criminal prosecution either for endorsements which were alleged forgeries, or for some other apparent criminal circumstance appertaining to the notes. At any rate, he realized and admitted his criminality in that regard so that he was entirely convinced of the necessity of the payment of these obligations held by existing creditors, so as to remove them from their hands and do away with the possibility of criminal proceedings against himself based upon them. It was evidently his intention that these obligations should be paid in full, independent of whether his other creditors were paid in full or not. He was willing for this purpose to give a first lien upon his entire property to the party who would advance the money necessary to pay these existing creditors in full. Although part of his assets according to the charges contained in the papers before the Court consisted of goods and articles purchased from other creditors who were unpaid, he was willing to mortgage these articles, the purchase price of which was still unpaid, to raise the necessary amount to pay off and discharge in full the indebtedness upon which he feared he was subject to criminal prosecution. It follows from this that the Bankrupt evidently intended to pay off the creditors holding these obliga-
(44) tions in full, and for that purpose to transfer or incumber his property independent of the consequences to all of his other creditors, whether they received anything or not. Under this state of facts it appears to this Court that the Bankrupt when insolvent did give this incumbrance with intent to hinder, delay or defray his creditors within the meaning of these terms as intended by Sections 3 and 67 of the Bankrupt Act.

The next matter for determination is as to the intent with which this incumbrance was accepted or taken by the beneficiary, Claude M. Dean. That it was taken in good faith in the ordinary acceptation of the terms is evident from the testimony. Mr. Dean was not an existing creditor of the Bankrupt. He had no reason before this appeal to him to know with any particularity of the bankrupt's condition, whether he was solvent or insolvent. He had no personal interest whatsoever of a pecuniary character to serve by any assistance to the Bankrupt. The Bankrupt had married his sister, and he was

therefore subject only to the impulses of a desire to assist in saving one so closely connected from the consequences mentioned in the letter. The Bankrupt appealed to him in the strongest possible terms for assistance to rescue him from an apprehended disgraceful exposure which threatened him, and Mr. Dean was called upon to respond immediately. He did respond; and the opinion of this Court so far as his response is concerned, is that the transaction was one in which he manifested perfect good faith and the most laudable desire to protect and save one who appealed to him for protection.

That, however, is not the question in the case. The question really is whether this security was accepted by him in contemplation of the provisions of the Bankrupt Act in any way prohibited by the Act, that is to say, whether he knew when he accepted it that the effect of it (45) would be directly or indirectly to avoid and make of none effect any of the provisions of that Act, and whether that knowledge on his part constituted on his part the taking of an incumbrance made in contemplation of or fraud upon he Act. The contention of the creditors is that no matter how praiseworthy may have been the action of Mr. Dean in endeavoring to assist his brother-in-law, he had no right to do it at their expense. In other words, they contend that if Mr. Dean assisted the Bankrupt in the plight in which he found him, and if for the necessary loan that he made to save him from criminal prosecution, he was secured both as to principal and interest (especially when that security consisted in part of the actual goods sold by the creditors who are now contesting his claim, and which have not been paid for) then in reality the assistance rendered to the Bankrupt was at the expense of the creditors.

From the facts stated in the Bill it is clear that Mr. Dean knew of the pressure upon his brother-in-law and of the urgent necessity to preserve him from criminal prosecution by taking up these compromising evidences of debt represented by the notes held by the Bank. He also knew that at the time the Bankrupt could apparently appeal to no one but himself to raise and lend the necessary money, and that in order to procure it he was willing to give a preferred lien upon or transfer of what was practically his entire property. He also knew the money loaned was not to be used for the payment of debts in the usual course of business, but for paying in full certain notes held by creditors who threatened criminal prosecution if they were not paid.

As a reasonable man he should have known that the transfer or encumbering by a Bankrupt of his entire property, leaving still outstanding unpaid creditors not protected by the encumbrance, means practically an end (46) of the carrying on of any commercial business, and that all of the Bankrupt's other creditors will be subordinated to the creditor receiving the lien, and that they all will receive nothing unless the entire property of the Bankrupt is sufficient to pay this new mortgage. In other words, he knew that the effect of giving this mortgage to him and the use of the money loaned by him to pay the notes to the Bank would be to discharge in full the obligations held by certain existing creditors, leaving to all other creditors nothing whatsoever except what might remain after the payment in full of the amount loaned by him to discharge these existing notes.

In the case of Ohio Valley Bank *vs.* Mack, 163 Fed. Rep. 155, before the Circuit Court of Appeals of the Sixth Circuit, where the decision was delivered by Mr. Circuit Judge Lurton, the Bankrupt, within four months prior to his Bankruptcy and while insolvent borrowed money on a mortgage and paid the same upon a debt that the Bankrupt owed his own father. The Court held that it appeared from the evidence that the Bankrupt intended to prefer his father in an honest debt over his other creditors, having equally as honest claims on him. The mortgage was attacked upon the ground that thereby the Bankrupt had indirectly effected a preference in favour of his own father. The Court below held that the evidence did not warrant the finding that the mortgagee knowingly abetted the Bankrupt in giving, or his father in receiving the preference, and sustained the mortgage, and the Court of Appeals affirmed the finding, saying, with reference to the mortgagee: "He stands therefore in the attitude of one who took a security" for money advanced at the time in good faith. This saves "his mortgage." It would appear from this that the meaning of the Court in that decision was that if the mort- (47) gagee had know of the intended preference and had abetted the Bankrupt in making it the mortgage would have been invalid. In the case of *in re* Kullberg, 176 Fed. Rep. 585, before the District Court of Minnesota, a mortgage given by a Bankrupt for a present consideration within four months prior to his Bankruptcy, was held good although the mortgagee knew that the proceeds were to be used to pay existing debts. The Court held that the fact that the mortgagee knows that

the proceeds of his loan are to be used to pay existing creditors, does not make the mortgage void; that the real question in the matter is whether the mortgagee had reasonable cause to believe at the time the mortgage was made that the Bankrupt was insolvent, and if he did not have reasonable cause to believe that the Bankrupt was insolvent when he gave the mortgage, then the fact that the Bankrupt intended to apply the proceeds of the mortgage to the payment of existing debts did not affect the validity of the mortgage. The reasoning of the Court would appear to be that knowledge of the fact of the morgagor's insolvency on the part of the mortgagee or the possession of reasonable cause to know that insolvency coupled with the knowledge that the proceeds of the mortgage would be applied to the discharge of existing debts, would be sufficient to show that the mortgagee knew that the mortgage was intended as a fraud upon the Act. So, in the case of Rogers *v.* The Fidelity Savings Bank & Loan Company, 172 Fed. Rep. 735, before the District Court of the Western District of Arkansas, where the Bankrupt within four months prior to his Bankruptcy sold out his business for value, the purchaser agreeing as part of the consideration to pay an existing debt of the Bankrupt, the Court held that as the purchaser had reasonable cause to know when he made the purchase that the Bankrupt was insolvent, and that the payment made out of the proceeds of the sale was intended as a preference, that invalidated the mort-
(48) gage. That the effect of the transaction was to prefer the Bank, and the transaction must be determined by its effect and not by its form.

Under the facts as charged in the Bill of Complaint Mr. Dean could not reasonably have failed to know that the proceeds of the mortgage would be applied to the payment of existing debts not in any ordinary course of business, but for the purpose of avoiding an apprehended criminal prosecution of the Bankrupt. Under these circumstances it cannot but follow as a conclusion that when he accepted this mortgage Mr. Dean should have known that it was made in contemplation at least of the provisions of the Bankrupt Act in that it was intended to operate and actually operated to accomplish something which was forbidden by that Statute.

The controlling case in the construction of the Bankrupt Act on this point in this Circuit is the case of Roberts *v.* Johnson, 151 Fed. Rep. 567, decided 5th Feb-

ruary, 1907. In this case a bill had been filed by the Trustee of the Bankrupt estate to set aside certain mortgages on the ground they were made with intent to hinder, delay and defraud creditors. It appeared that the Bankrupt owed a debt to a manufacturer who was pressing for payment. A brother of the creditor, who was employed by him, referred the Bankrupt to another brother who had no business connection with the creditor, but who agreed to make a loan to be secured by a mortgage of practically all the Bankrupt's property. The loan slightly exceed the amount of the debt. As soon as the transaction was consummated and the mortgage executed the Bankrupt paid the creditor out of the proceeds of the loan. The Bankrupt was insolvent at the time, and eight days later filed his voluntary petition in Bankruptcy. The mortgagee testified that he had no knowledge of the debt to his brother; that he had no interest in his brother's business, and that he did not know (49) that the proceeds of the mortgage loan were to be applied to the debt to his brother. The Circuit Court set aside the mortgage and its judgment was sustained by the Circuit Court of Appeals. It was sustained on the ground that if the mortgagee knew or should have known that the effect of the transaction was to give a preference to the creditor then the mortgages were within the prohibition of the Bankrupt Act and the Circuit Court having so found notwithstanding the denial of the mortgagee and the circumstances supporting this finding the Court of Appeals should affirm the judgment.

"Courts cannot permit to be done by indirection what the law forbids to be directly done, and without regard to the form, they consider the purpose and effect of the transaction, however devious the ways by which it is accomplished. The obvious effect of these dealings has been the defeat of the purpose of the Bankrupt Act."

The Court further approved the principles adjudicated in *in re* Pease, 129 Fed. Rep. 446.

This decision controls this Court and under the principles as adjudicated by it and the facts admitted in the case at bar, the demurrer must be overruled.

The stipulation of counsel in the letters submitted contemplating this hearing as a final hearing a formal judgment will be entered overruling the demurrer and setting aside the deed of trust.

HENRY A. M. SMITH,
U. S. Dist. Judge for S. C. designated to sit in the Eastern Dist. of Va.

25 July, 1912.

(50) **DECREE OF DEMURRER,**

Filed July 25, 1912.

This cause having come on to be heard and having been heard:

Now, in pursuance of the conclusions of law and fact found in the opinion herein filed of even date herewith:

IT IS ORDERED AND DECREED AND ADJUDGED That the demurrer of Claude M. Dean to the Bill of Complaint be and the same is hereby overruled.

IT IS FURTHER ORDERED, DECREED AND ADJUDGED That the deed of trust from R. Crawley Jones and Marie E. Jones, his wife, to E. C. Dean, dated September 3rd, 1909, and recorded in the Clerk's Office of the Circuit Court of Dinwiddie County, Virginia, on the 11th day of September, 1909, is invalid under the provisions of the Bankrupt Act and is hereby set aside, vacated and declared null and void.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the defendant W. P. Wells as substituted Trustee do pay over to the Complainant the sum of $1,634.00 representing the net proceeds of the property embraced in the said deed of trust; to be administered and disbursed as part of the bankrupt estate free of any liens thereon by reason of said deed of trust hereinbefore vacated.

HENRY A. M. SMITH,
U. S. Judge for Dist. S. C. designated to sit in the Eastern Dist. of Va.

25 July, 1912.

ORDER MODIFYING DECREE OF JULY 25, 1912, SO AS TO LIMIT IT ONLY TO A DECREE OVERRULING THE DEMURRER FILED BY CLAUDE M. DEAN.

(51)

Filed Sept. 28, 1912.

In this cause the hearing was had on 10th July, 1912, on Bill and Demurrer, the Demurrer being to the whole Bill. Before the hearing Counsel stated that a stipulation had been entered into with regard to the hearing, and produced the two following letters, viz.,

"Richmond, Va., June 13, 1912.
"Roper & Davis, Esqs.,
" Petersburg, Va.
" Davis, Trustee, *vs.* Dean, et al.
" Dear Sir:—
" I beg to advise you that Judge Waddill has set "the Demurrer filed by me in the above case down for "hearing on Thursday, July 11, 1912.
" In order that the questions involved in this case "may be met and passed upon by the Court on this De- "murrer I take it you will have no objection to consider- "ing the letter from Jones to me asking for the loan of "$1,600.00 considered as a part of your bill, and thereby "have the clean cut issue before the Court, viz., as to "whether or not the giving of the deed of trust under "these circumstances is or is not a preference, which is, (52) "according to my understanding, the real purport "of your bill. If this will meet with your approval kind- "ly let me know, and we can stipulate at the time you "come over to argue the matter that the same be so con- "sidered a part of your bill.

"Yours truly,
"CLAUDE M. DEAN."
"June 17, 1912. R-A.

"Mr. Claude M. Dean,
" Richmond, Va.
"Dear Sir:—
" We have your letter of recent date regarding the "suit pending in the U. S. District Court at Richmond, "styled "Davis, Trustee, *vs.* Dean & others," and note "that Judge Waddill has set the Demurrer filed by you "down for argument on Thursday, July 11th, 1912, and "further note that you would like for us to consent that "the letter received by you from Crawley Jones asking "for the loan of $1,600.00 shall be considered as a part "of our bill filed in said suit.
" In reply beg leave to say that in order that there "may be a clean-cut issue before the Court on the de- "murrer as to whether or not the deed of trust executed "by the said R. Crawley Jones and wife, dated Septem- "ber 3rd, 1909, is a valid lien and protected by the pro- "visions of the Bankruptcy Act, we are willing to admit "that said letter, which is set out on pages 38 and 39 of "the printed record in the appeal taken from the District "Court styled "R. Crawley Jones, alleged Bankrupt, *vs.* "Augustus Wright Co. & Others," No. 988, was receiv- "ed by you and answered by you on the dates and in the

"manner set out in your testimony given before the said "District Court on April 9th, 1910, in said printed rec- "ord, but we are not willing to admit that the statements "contained in said letter are true. We are not to be con-
(53) "sidered as in any way bound by the statements "therein contained.

" And will present to the Court a clean-cut question, "and if we are wrong in thinking that the said deed of "trust is invalid, it may save a good deal of expense and "considerable trouble and we had just as well have the "point raised now and decided by the Court.

"Yours very truly,

"ROPER & DAVIS."

The Court understood Counsel to further state orally at the trial that it was desired to accelerate the cause, and that under the stipulation the hearing was to be taken as a final hearing, the Defendants having no other facts to bring forward save as were set out in the additional exhibits desired to be attached to the Bill and that if this was done and the case argued as if these exhibits formed part of the case made by the Bill the cause would be finally determined upon the Demurrer. No further written stipulation was entered into and the cause was argued as if these additional exhibits were attached to the Bill and, as the Court understood, upon the assumption and understanding that the hearing was a final one and a final decree should be made. In accordance therewith the Court, upon arriving at its conclusions filed a final decree.

The Defendant Claude M. Dean has now applied through his Counsel for a modification of the decree on the ground that the stipulation entered into by the letters and by the Counsel at the trial was not intended to go further than the hearing of the Demurrer, and did not include the rendering of a final decree, and that the rendering of a final decree has taken him by surprise, as his intention and expectation was that if the Demurrer was overruled his client, would be entitled to answer over under Rule 34 of the U. S. Rules in Equity, and that great injustice will be done the Defendant if he is not
(54) allowed to answer over to the charge of fraud implied in the Bill and to introduce proof to rebut it.

If in this case the Demurrer was overruled the Defendant was to be allowed to answer over and in that way raise the same questions again, it is difficult to see why any stipulation should have been entered into. The Com-

plainant had nothing to gain by incorporating this additional matter, which was desired by Defendants, in his Bill as part of his case if the hearing was not to advance him in case the Bill was upheld. These exhibits incorporated at the Defendants' request may have been distinctly prejudicial to Complainant, and he was not called upon to thus adopt and bind himself by testimony really a part of Defendants' case, and which Complainant would otherwise have been entitled to traverse and rebut.

If the stipulation was to the effect claimed by the Defendant the Complainant was very unwise to have entered into it, and his action in so doing failed entirely to accomplish the purpose intended according to the statement of Counsel on both sides, which was to have a final determination as speedily as possible.

The only written stipulation is contained in the letters as consummated by the action of the Complainant as stated in the decree hereinbefore filed in incorporating the additional matters therein referred to as a part of the Bill.

The Court did not require a more explicit stipulation in writing from Counsel, embodying the construction of those letters understood by the Court from the oral statements of Counsel.

(55) The Court is also at a loss to see wherein any prejudice has operated against the Defendant by the final decree. The additional matter incorporated as exhibits to the Bill consist of the letter of the Bankrupt to the Defendant, Mr. Dean, and the latter's own testimony. The decree herein treats this testimony as part of the admitted facts in the case and the conclusions of the Court are arrived at on that assumption. There would not appear to be anything that could be set up in an answer more favorable to Defendants by way of defense on the facts than Mr. Dean's own testimony. Ordinarily where a Demurrer to the whole Bill was over-ruled, under the English Chancery Practice, the Defendant was ordered to answer over. The Demurrer to the whole Bill was to the effect that upon the case made by the Bill the Defendant should not be required to answer further. As the relief prayed usually depended upon a discovery to be made by the Defendant in answer to the interrogatories of the Bill, upon the over-ruling of a Demurrer the Defendant was required, not permitted to answer over. Rule 34 of the Rules in Equity prescribed by the Supreme Court is in recognition and enforcement of this principle and upon the Defendant appearing and demurring, and his demur-

rer being over-ruled, the decree would be that he should answer the Bill.

It does not necessarily follow that where no answer is sought or required by the Complainant and there are no additional facts that can be pleaded by Defendant, and the only effect of the Defendant's answering will be to permit him to raise by answer the identical questions of law alone that have been determined by the decree on the Demurrer, that he will be permitted to answer. The usual practice, however (unless it be stipulated that the hearing on Bill and Demurrer shall be a final one) is to direct the Defendant to answer whenever a Demurrer is overruled.

(56) The letters seemed to the Court to embody such a stipulation. This stipulation it understood Counsel at the trial to confirm and emphasize. In view, however, of the statements of the Defendant and his Counsel the Court is loth to be in any wise in the position of causing any injustice to be done Defendant by enforcing the stipulation as it understood it, especially where there is any difference of recollections as to oral stipulation not required to be reduced to writing, and where if the decree rendered be correct the Complainant will obtain his relief at the cost only of some delay.

Counsel of standing and position are entitled to the consideration of the Court, and believing, as the Court does, that Counsel for the defense is entirely sincere in his views of the construction of the stipulation in the letters as confirmed at the hearing, due weight will be *given* and the decree modified accordingly.

It is therefore

ORDERED AND DECREED That the decree herein filed 25th July, 1912, be modified so as to limit it only to a decree that the Demurrer of Claude M. Dean to the Bill of Complaint be over-ruled, for the reasons stated in the opinion filed.

IT IS FURTHER ORDERED AND DECREED That the Defendants herein do answer the Bill of Complaint herein on or before the second Monday in October, 1912, or in default thereof that the Bill be taken *pro confesso* against them.

(57)

IT IS FURTHER ORDERED AND DECREED That as to so much additional matter as is mentioned in the opinion herein filed on the 25th July, 1912, as was incorporated by the Complainant as exhibits to his Bill for the hearing

in said decree referred to the Complainant is at liberty to treat the same as not matter admitted by him, but matter he may traverse, deny or rebut as he may be advised.

HENRY A. M. SMITH,
U. S. Judge for S. C., designated to sit in the Eastern Dist. of Virginia.

28 September, 1912.

(58) **ANSWER OF CLAUDE M. DEAN, DEFENDANT**

Filed Oct.14,1912.

This Defendant now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

First. This defendant admits that the allegations contained in paragraph one of the bill of complaint are true.

Second. This defendant admits that the said R. Crawley Jones was adjudicated an involuntary bankrupt on April 25, 1910, upon a petition filed by certain of his unsecured creditors in this Honorable Court on Dec. 24, 1909, but this defendant is advised and avers that the said R. Crawley Jones was adjudicated an involuntary bankrupt only upon the ground that "he did prefer certain of his creditors who then held his notes, which had been theretofore executed for value by him and were then held (59) by the Banks in Petersburg, Virginia," and not because of the giving of the deed of trust of September 3, 1909, to secure the loan of $1,600 made by this defendant to the said bankrupt and as conclusive proof of this said fact this defendant cites the opinion of the United States Circuit Court of Appeals for this circuit, rendered in the case of R. Crawley Jones, involuntary bankrupt, appellant, vs. Aug. Wright Co. et el, appellee, a copy of which opinion is filed herewith as Exhibit "C. M. D. No. 1." and asked to be taken and read as a part of this answer.

Further answering the remaining allegations contained in the second paragraph of said bill, this defendant having no knowledge of the same neither denies nor admits them.

Third. This defendant admits that by virtue of the Acts of Congress relating to bankruptcy, the complainant trustee of the estate of R. Crawley Jones, bankrupt, became vested with such rights of action as the creditors of the said R. Crawley Jones had at the time of his adjudication, but this defendant denies that there were any creditors of said bankrupt who had a right of action against this defendant to set aside the deed of trust dated Sept. 3, 1909, as all the creditors of said bankrupt were merely creditors at large.

Fourth. This defendant denies that the transaction as set out and detailed in said paragraph four of the bill of complaint took place in the manner and form as stated therein, but is advised and therefore avers that the facts and circumstances relating to said transaction are as follows:

On September 2, 1909, this defendant received from R. Crawley Jones a letter asking for the loan of $1,600. This letter was brought to this defendant by the bank-
(60) rupt's father, and is as follows:

"Darvills, Va., Sept. 1st, '09.

Dear Claude:

I am in serious trouble and need your help at once badly, being charged with a very grave offense under the law and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600.00 in cash I will be saved, so for God's sake loan it to me, and save my wife and child from disgrace. If you will do this I will give you notes for the amount, and a deed of trust on everything I have or possess to secure you. All I need is a little time for I have enough to more than pay you five times over again. It is absolutely necessary that I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes inclosed for the amount and as soon as you prepare deed of trust I will sign same.

Sincerely yours,

"R. C. JONES."

This defendant was informed by the father of the said R. Crawley Jones that his son had certain paper in the banks in Petersburg, Va., and that there was some question as to whether or not one of the parties on said paper had signed the same. He also stated that his son rather than have any trouble or embarrassment to himself or his business had decided it would be best to pay this paper which he had theretofore given to some of his creditors; that he needed $1,600, which together with five or six hundred dollars he (his father) had loaned him and two hundred dollars his cousin would loan him, would enable him to pay this paper held by the banks. Upon inquiry by this defendant, this party stated that the financial condition of his son R. Crawley Jones was very good; that he owed very little, and that he had a fine tobacco and corn crop, a large stock of goods and wares in his store, and that he was doing a very good business; that the corn crop in his judgment was worth between five and six hundred dollars, and the tobacco crop about three or four hundred; that his son owned a very valuable farm, with a large dwelling house and numerous outhouses, stables and store on same; and that he had about completed the building a new dwelling house thereon, which had taken a considerable amount of cash money, as he had (61) had it built by day labor; that he considered his circumstances so good he did not intend or expect to ask for any security for the amount he was loaning him; that he would have loaned him more, but that he had not as yet cut his own tobacco crop and therefore he too was short of ready cash; that his son was doing a good business and all that he needed was some ready cash for a short while to extricate himself from this embarrassment and that there was no doubt but what he would be able to return it soon. After this full and frank statement, this defendant requested J. Samuel Jones to meet him in Petersburg the following afternoon.

On calling at the bank in Petersburg where the notes were held, its Cashier informed this defendant that R. Crawley Jones stood as well as any young man in that community; that he had excellent credit and the merchants in Petersburg had a great deal of confidence in him. When this defendant asked him why the bank did not take a deed of trust from Mr. Jones, the Cashier replied: "We do not own the notes and people for whom we are collecting want cash money; Mr. Jones has plenty to pay everybody he owes but these people want cash

money. I have been up there and seen his place and it seems to me he has enough to pay everybody he owes."

Relying upon the information gotten from these various sources this defendant believing the said Jones to be solvent and only needing some ready cash to tide him over, loaned him the said $1,600 and with this sum and some seven or eight hundred dollars which he had, the said J. Samuel Jones paid the notes of his son held by the banks in Petersburg, and which amounted to about $2,300 or $2,400. This defendant told the father to tell his son to come to Richmond the next day and execute the deed of trust which he would prepare. J. Samuel Jones explained that it was very important for his son to remain at home (62) and cut his tobacco if that day was clear; so, on the following Friday, this defendant went to the home of R. Crawley Jones with the deed of trust which he had prepared on the 3rd day of September, 1909, leaving only blank spaces therein for a description of the property and the name of the Notary. When this defendant learned that a Mr. Wells, a notary public, was to take the acknowledgement to the deed he filed in his name, but inadvertently failed to change the date of said acknowledgment. However, on learning of this fact this defendant immediately wrote the Notary that it was an inadvertence on his part not changing the date of his certificate of acknowledgment from Sept. 3, 1909, to Sept. 10, 1909.

Owing to the fact that Mr. Jones had been threatened with criminal proceedings this defendant was unable to see him either before or when the loan was made so as to question him about his financial condition before making said loan. But when this defendant arrived on the tenth day of September at his home, he took this defendant all over his farm and showed him the various crops of tobacco, corn, peas, &c.; his live stock, consisting of cows, calves, hogs, pigs, chickens, mules, &c.; his farming implements, wagons, carts, plows, &c.; his dwelling house, which was a very large house, the numerous outhouses, stables, blacksmith shop, store and a new dwelling house he was then building by day labor, and which was about completed and was worth about $1,500; he also showed this defendant his store and for a country store this defendant estimated the stock to be worth about $3,000, and the inventory afterwards taken by the trustee in the deed of trust showed it to be worth about $2,607.60, the prices in the inventory being put from 25 per cent. to 50 per cent. less than the regular selling price on many of the articles. The farm consisted of 201 acres and was valued

at $4.500. This farm this defendant understood before (63) he made the loan had been paid for; that it was not until he was filling in the blanks in the deed of trust that he learned for the first time that Jones had borrowed about $3,000 on same on long term notes. The first of these notes, however, would not come due until the following February, and it was only for about $175.

After going over said farm and through said store this defendant was fully convinced that the statements contained in the letter of R. Crawley Jones to him were true, as likewise the statements of his father and the cashier of the Petersburg bank. This defendant considered the said Jones to be very prosperous—his house being nicely furnished, his wife and child being neatly dressed and living in comfort.

This defendant is advised that the said Jones valued his corn crop, tobacco crop, peas and potatoes at $1,000; his personal property consisting of live stock and farming implements at $1,100; his household goods, household and kitchen furniture, &c., at more than $1,000; and that his open accounts amounted to about $500.

At the time of the signing of the deed of trust dated Sept. 3, 1909, the said Jones asked his defendant if he wanted the deed of trust to cover all these things. This defendant replied that while he did not think it necessary he thought it best in order to carry out the agreement contained in his letter to this defendant.

This defendant avers that he accepted the deed of trust in good faith as security for a present cash loan of $1,600, and without any intent or purpose of aiding said Jones to defraud, delay or hinder his creditors, and not in contemplation of or in fraud of the bankrupt act, or any of its provisions, believing him to be solvent and that he would continue his business. This defendant did not believe or have any reasonable cause to believe that said Jones intended to prefer him over his other creditors.

For further answer to this paragraph of complainant's bill, this defendant denies that he was a pre-existing creditor of the said bankrupt, and alleges that the giving of he deed of trust in question did not constitute a prefer- (64) ence under the bankrupt act nor did it constitute such a preference as is prohibited by the provisions of the bankrupt law; that the estate of the bankrupt was thereby neither diminished nor depleted because this defendant gave a present equivalent for the security pledged for the repayment of the money loaned.

Further answering said bill of complaint, this de-

fendant is advised and avers that the purpose and intent of the bankrupt in borrowing the said $1,600 and the giving this defendant the said deed of trust was for the purpose of continuing his business and not for any fraudulent purpose of diminishing his assets; and that this defendant made the loan and received the deed of trust as a security therefor in good faith, and further avers that the said transaction did not and could not work an unequal distribution of the bankrupt's property.

Further answering said bill of complaint, this defendant admits that the Trustee under the deed of trust took possession of the property mentioned therein on Sept. 13, 1909, and avers that any defect appearing in said deed of trust is cured by the trustees taking such possession of said property before the attachment of any lien thereon and before the filing of the petition to adjudicate the said Jones a bankrupt.

Sixth. This defendant admits that said sum secured by the said deed of trust was loaned by him, but he denies that he used said sum "in taking up and getting out of the possession of said bank the bogus notes, so to speak, held by the bank," as charged in said bill, but is advised and avers that the father of the said bankrupt at the direction of his son used said sum of $1,600, together with some seven or eight hundred dollars additional in paying the notes then held by the banks. This defendant is advised and charges that some of the notes paid by the direc-
(65) tion of the said bankrupt through his father were stamped "Paid" by one of the banks, but those paid at the other bank were not so stamped, because, as this defendant is advised, it was after banking hours and the stamp not being conveniently at hand, the same were not marked paid and this defendant avers that this failure on the part of the bank so mark said notes "paid" was not because of any understanding or request of the parties. This defendant avers that he afterwards marked the said notes "paid" himself, and afterwards turned the same over to the said R. Crawley Jones.

Further answering this paragraph of complainant's bill, this defendant denies that he knew or had reasonable cause to believe at the time of his interview with the said J. Samuel Jones in the City of Richmond, Va., on Sept. 2, 1909, or on Sept. 3, 1909, or at the time of the execution of said deed of trust on Sept. 10, 1909, that the said R. Crawley Jones was insolvent.

Seventh. This defendant further denies that he knew or had reasonable cause to believe that it was the intention and purpose of the said R. Crawley Jones by the execution and delivery of said deed of trust, to prefer him over his other creditors of the said R. Crawley Jones, or that said deed of trust was executed by the said R. Crawley Jones and his wife with that express purpose and intention, or that the effect of the said deed of trust was to give this defendant a greater percentage of his debt than other creditors of the same class, but as already averred the purpose of the making said loan and the giving of said deed of trust was to enable the said Jones to continue his business.

Eighth. This defendant does not deny the allegations (66) of paragraph eight of complainant's bill, with the exception of that part which states that the first note secured under the deed of trust had been past due for two days, and this, this defendant denies, and avers that said first note was extended three days before the actually execution of said deed of trust, and that said extension was written on the face of said first note, and therefore none of the notes were due and payable at the time of the execution of the deed of trust, as alleged in said bill.

Ninth. Answering the allegations of paragraph nine of said bill of complaint, this defendant neither admits nor denies same.

Tenth. For answer to the tenth paragraph of complainant's bill, this defendant says he is not fully advised as to same and ask that the schedules themselves be produced as they will speak for themselves.

Eleventh. For answer to the eleventh paragraph of complainant's bill, this defendant says he is not informed fully as to the specific property the Trustee sold under the terms of the deed of trust dated Sept. 3, 1909, nor as to the other allegations therein contained and calls for strict proof of same.

Further answering the latter part of this paragraph of complainant's bill, this defendant says he was not a party to the agreement between the said Jones and the said Roper therein refrred to, and charges it to be impertinent matter, and ask that the complainant be required to strike this part of said paragraph from said

complaint. In case the same should not be deemed im-
(67) pertinent matter, this defendant avers that the alleged advice he gave the said trustee is contained in a letter dated Feb. 3, 1910, a carbon copy of which letter, this defendant now files as exhibit "C. M. D. No. 2," and asks that the same be taken and read as a part of this answer.

Twelfth. This defendant admits the first part of the 12th paragraph of complainant's bill to be true, and avers that he consented to the entry of the order therein mentioned for the purpose of securing an early hearing of this cause.

For further answer to the second part of this paragraph, this defendant denies that said deed of trust of Sept. 3, 1909, is void and of no effect as to the other creditors of the said R. Crawley Jones; and denies that this defendant knew or had reasonable cause to believe at that time that the said R. Crawley Jones was insolvent; and denies that said deed of trust was executed by said R. Crawley Jones with the intent on his part to prefer this defendant over his other creditors of the same class: and further denies that there were any other creditors of the same class with this defendant; and this defendant further denies that the effect of the said deed of trust was to enable this defendant to collect a greater percentage of his debt than any other creditors of the same class; and this defendant further denies that he knew or had a reasonable cause to believe that the said R. Crawley Jones intended by the execution and delivery of said deed of trust to prefer him over his other creditors of the same class.

For further answer to the bill of complaint, this defendant is advised and charges that the deed of trust in question was neither given by said bankrupt or received
(67½) by this defendant with any intent or purpose of either to hinder, delay or defraud the other creditors of the said bankrupt; and this defendant further charges that the said deed of trust was given in consideration of an actual valuable consideration and accepted by this defendant in perfect good faith and without any intent on his part or on the part of the bankrupt to violate any of the provisions of the bankruptcy law or for the purpose or intent of aiding in any way the bankrupt to hinder, de-

lay or defraud his creditors, and that the transaction was a bona fide one; and further denies that he has done any act contrary to equity and good conscience, and which tends to the wrong and injury of the complainant.

This defendant denies each and every allegation in said bill of complaint not hereinbefore specifically answered, and prays that he be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

CLAUDE M. DEAN.

WYNDHAM R. MEREDITH,
Counsel for the defendant
Claude M. Dean.

EXHIBIT

(68) "C. M. D. No. 1."

United States Circuit Court of Appeals.

FOURTH CIRCUIT.

No. 988.

R. CRAWLEY JONES, ALLEGED BANKRUPT, Appellant,

verses

AUG. WRIGHT CO., ET AL., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond.

[Argued November 28, 1910. Decided December 21, 1910.]

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

G. A. HANSON and WYNDHAM R. MEREDITH for the appellant and BARTLETT ROPER, JR., and CARL H. DAVIS, for the appellees.

Per curiam:

The court below properly found that the appellant was not engaged chiefly in farming and the tillage of the soil, and was impelled to the conclusion that the appellant committed the act of bankruptcy alleged by the petitioning creditors, that at the time of the filing of the petition he was insolvent, and that being so insolvent he did prefer certain of his creditors who then held his notes, which had been theretofore executed for value by him and were then held by the Banks in Petersburg, Virginia, as was

shown by the testimony submitted to said court. We find no error.

Affirmed.

(69) **EXHIBIT**

"C. M. D. No. 2."

"Richmond, Va., Feb. 3, 1910.

"Dear Mr. Wells:

Mr. Jones was into see me to-day, and states that you are unwilling to turn over to him his books containing his accounts, &c., which he turned over to you as Trustee under the deed of trust of which I am the beneficiary. He also states that unless most of the bills that are due him are collected at once, it will be impossible to collect the same or to enforce the payment of same. It is my opinion that it is your duty to turn over these books to Mr. Jones and everything else remaining over which you took charge under the deed of trust, now that you have sold sufficient to pay all the expenses and the amount of the notes for which the deed was given to secure, your duties and authority under the same are all at an end, with the exception of paying the money over. The bond you gave could not under any circumstances be construed to cover any deed or agreement that Mr. Jones or you may have entered into with any one, except the deed of trust of Sept. 3rd, 1909. In fact one of the conditions of the bond is that you will turn over to Mr. Jones everything over and above the amount of the notes and your expenses. The agreement signed by Roper, Jones and yourself could not in any way be held binding as it was a mutual agreement and has not my signature and besides the construction put upon that agreement and the one all the parties understood at the time it was signed, it was only to cover the terms of my deed of trust and was entered into with the sole purpose of having you to hold the money due me under my deed until said deed could be passed on, and besides this you had no rights under my deed of trust to sign any such agreement, and my understanding is you really signed the same under a misapprehension and on the information that I had signed a similar agreement or one of like nature.

As to Mr. Jones' right to have entire possession over his property pending the petition to have him adjudged an involuntary bankrupt, I enclose you herewith extracts of law from Remington on Bankruptcy bearing on that subject.

I am not writing you this letter to give you any directions, but only to inform you as to the law, because I deem it my duty to do so, in view of the fact that you are the trustee under a deed of trust of which I am the beneficiary, and I trust you will construe it in the light in which it is written.

With kind regards and best wishes, I am,

Sincerely yours,

(Signed) CLAUDE M. DEAN.

(70)

DEPOSITION FOR COMPLAINANT,

Filed in Open Court Feb. 15, 1913.

It is agreed between counsel that the two papers marked "B. C. S. A." and "B. C. S. B." here handed to the notary, shall be considered and read as evidence in this cause subject to any exceptions that may be made by counsel for Claude M. Dean as to the irrelevancy thereof.

Memo: Counsel for Claude M. Dean excepts to paper marked "B. C. S. B." as irrelevant testimony under the issues joined and set out in the bill of complaint filed in this cause by R. Beale Davis, Jr., Trustee.

It is further agreed that the paper marked "C," here handed to the notary, is a true copy of the deed of trust (71) executed by R. Crawley Jones and Marie E. Jones, his wife, to Edward C. Dean, Trustee, dated September 3rd, 1909, and said paper shall be considered and read as evidence in this cause.

It is further agreed between counsel that the paper marked "X," being one of the original schedules filed by R. Crawley Jones, Bankrupt, in the United States District Court for the Eastern District of Virginia, on the 23rd of March, 1911, here handed to the notary, shall be considered and read as evidence in this cause.

Memo: Counsel for Claude M. Dean excepts to the introduction of the foregoing schedule marked "X" on the ground that the same and each and all of its items are irrelevant and improper testimony in the issues joined in these proceedings between the said Dean and R. Beale Davis, Jr., Trustee.

Present: W. R. Meredith, attorney for Claude M. Dean, one of the defendants; Roper & Davis, attorney for R. Beale Davis, Jr., Trustee, complainant.

JAMES M. QUICKE, JR., a witness of lawful age, being first duly sworn, deposes and says as follows:

1st Q. By Bartlett Roper, Jr., of counsel for complainant: Please state your name, age, residence and occupation? A. James M. Quicke, Jr., Attorney at Law, Petersburg, Va., 51 years.

(72) 2nd Q. Please state whether or not you were the trustee named in a certain deed of trust from R. Crawley Jones and Marie E. Jones, his wife, dated 20th day of February, 1909. A. Yes, sir, I was.

3rd Q. Have you the original deed of trust in your possession? A. I have.

4th Q. Will you kindly look at same and tell me when the said deed of trust was admitted to record in the Clerk's Office of the Circuit Court of Dinwiddie County, Va.? A. The certificate of the County Clerk of Dinwiddie County shows that it was admitted to record March 31st, 1909. The certificate of the County Clerk of the County of Brunswick shows that the deed of trust was admitted to record in the Clerk's Office of Brunswick County on January 28th, 1910.

5th Q. Please examine the deed and let me know what property was embraced or covered thereby? A. The deed of trust conveyed to me as trustee a tract of land in Dinwiddie County in Darvills District, containing about 201 acres, and certain personal property consisting of mules, cows, wagons, harness, a surry, certain farm implements, household goods and crops growing upon the land at the time, all of which are described in the deed of trust.

(73) 6th Q. Please state the amount secured by the deed of trust? A. The deed of trust was given to secure three notes, of the same date as the said deed of trust, each for the sum of $1,000, with interest thereon from date at the rate of six per cent, the notes being payable on or before three, four and five years after date, respectively, and the expenses of enforcing the deed of trust in case enforcement should become necessary, including the commission of five per cent to the trustee.

7th Q. Please state whether or not as trustee you foreclosed the said deed of trust, and if so, on what date, if you remember. A. I did and sold the property on the premises on March 8th, 1910.

8th Q. Please state the amount realized by you as trustee from the sale of the farm mentioned in said deed of trust. A. The farm sold for $2,920.00.

9th Q. Please state the amount realized by you from the sale of the personal property mentioned in said deed of trust. A. The amount realized from the sale of the personal property was $534.25.

(74) 10th Q. Please state after paying the costs of the sale, including auctioneer's fees and your commissions and any other costs of sale, whether or not you realized a sufficient sum to discharge the amount due under said deed of trust. A. I did not. The statement of the receipts from the sale of the real and personal property and of expenditures is as follows:

Real Estate sold for.....		$2,920 00
Personal property sold for.....		534 25
All fees and expenses of the trust	$265 42	
Paid to R. E. Blakey, the holder of the notes on account of the debt secured	3,188 83	
	$3,454 25	$3,454 25
At the date of settlement with R. E. Blakey the amount of the debt secured then due him, the settlement having been made on April 5, 1910, was the amount of notes secured.		
Interest to April 5, 1910.....		02 80
		$3,202 80

After payment of costs and expenses it thus fell short of paying the debt secured to the holder thereof by (75) the sum of $13.97. The difference being so small Mr. Blakey accepted the amount of $3,188.83 in payment of the notes secured by the deed of trust.

11th Q. Please state how the sale held by you as trustee was attended. I mean how was the crowd attending the sale—was it a large or a small one? A. As well as I can recall now, it was a fairly well ,attended sale and that is the impression that has remained in my mind. I could not say at this time how many people were present, but, according to my recollection there was a good attendance, and generally the bidding was fairly lively.

12 th Q. How was this sale advertised by you. A. This sale was advertised by a notice published in the Index Appeal, a newspaper published in this city, by hand-

bills distributed by the auctioneer, Mr. A. G. Butterworth, who informed me that he distributed them freely throughout the county, and by these same hand-bills mailed by myself to various parts of the county to persons who I thought might be interested in the property or who would post the notices as a favor to me. I think I mailed probably twenty-five or thirty of these printed (76) hand-bills to various persons with a request to post them somewhere so that they might be seen.

Memo: It is agreed between counsel that the paper marked "J. M. Q. No. 1," here handed to the notary, is a true copy of the deed of trust executed by R. Crawley Jones and Marie E. Jones, his wife, to James M. Quicke, Jr., Trustee, dated February 20th, 1909, and the same shall be considered and read as evidence in this cause.

The foregoing paper and deed and the testimony of this witness are excepted to by counsel for Claude M. Dean as irrelevant and improper testimony concerning the issues joined in this cause. By agreement of counsel this exception is to be treated as an exception to each question and answer contained in the foregoing evidence.

And further this deponent saith not.

(By agreement of counsel the signature of the witness was waived.)

(77)

JOHN W. LONG, a witness of lawful age, being first duly sworn, deposes and says as follows:

1st Q. By Barlett Roper, Jr., of counsel for complainant: Please state your name, age, residence and occupation. A. John W. Long, Petersburg, Virginia, Cashier of the Virginia National Bank, age 46 years.

2nd Q. How long have you been cashier of the Virginia National Bank? A. Since April 1st, 1908.

3rd Q. Please state what is the capitalization of the Virginia National Bank, of this city. A. $400,000.00.

4th Q. Do you mean that there are $400,000.00 worth of stock issued and outstanding? A. Yes, sir.

5th Q. On the 3rd day of September, 1909, did your bank hold any notes made by R. Crawley Jones, of Darvills, Dinwiddie County, Va.? A I can't state positively as to that date. I know that the bank held some notes made by Mr. R. C. Jones, of Darvills. I could state the

dates if I had the records here with me. The bank held the notes about that time.

6th Q. Were any notes made by R. Crawley Jones taken up about that time at your bank? A. Yes, sir; there were some notes taken up or turned over to Mr. Jones' father.

(78) 7th Q. Were the notes marked paid? A. No, sir.

8th Q. Why were not the notes marked paid? A. Because he didn't want them marked paid. They were taken up and sold to Mr. Jones before maturity.

9th Q. Then at the time these notes were taken up some of the notes were not due? Am I correct? A. Yes, sir; that is correct.

10th Q. On or about the 3rd day of September, or the day these notes were taken up by Mr. J. Samuel Jones, the father of R. Crawley Jones, was Mr. Claude M. Dean in your bank during the morning of the day the notes were taken up? A. Mr. Dean was in the bank once or twice that day—I think probably twice. I can't name the exact hour. I think he was there in the forenoon and probably in the afternoon. He was in there at least twice that day but I am not positive about the exact hour.

11th Q. How were these notes taken up—with currency or with a check? A. They were taken up with currency.

(79) 12th Q. Was Mr. Dean present, or in the bank, when this currency passed? A. I am not positive about whether Mr. Dean was present at the time the currency was passed or not. Mr. Jones' father gave me the currency and took the notes.

13th Q. Mr. Dean prior to that time had been in the bank once or twice and talked with you, had he not? A. I can't recall any of the conversations had with Mr. Dean prior to that time. I think that he made some inquiries as to whether I had seen the senior Mr. Jones.

14th Q. Mr. Long, did you ever visit in your life the farm formerly owned by R. Crawley Jones in Dinwiddie County, near Darvills, Va.? A. No, sir; I have never been there in my life.

15th Q. In the taking up of these notes did you ever have any transaction whatsoever, or any dealings whatsoever, with Mr. R. Crawley Jones at the time these notes were taken up? A. No, sir.

16th Q. At the time these notes were taken up on the 3rd day of September, 1909, did you know of any arrangement whatsoever between Mr. R. Crawley Jones and Claude M. Dean by which Mr. R. Crawley Jones was

to give Mr. Claude M. Dean a deed of trust on certain property in Dinwiddie County to secure him the amount (80) of $1,600.00? A. No, sir; I never heard of any.

17th Q. Did Mr. Claude M. Dean ever ask you why your bank, the Virginia National Bank, did not take a deed of trust from Mr. R. Crawley Jones? A. If he ever asked such a question I don't remember it? I don't remember any such question as that. I don't think he asked me that question. I certainly don't recall any such question.

18th Q. Did you ever state to Mr. Claude M. Dean that Mr. R. Crawley Jones had plenty to pay everybody? A. No, sir.

19th Q. Did you ever state to Mr. Claude M. Dean that you had been up to see the place of R. Crawley Jones and he seemed to have enough to pay everybody he owed? A. No, sir, because I have never seen Mr. R. Crawley Jones' place.

20th Q. Did you ever state to Mr. Claude M. Dean that Mr. Jones stood well as a young man in the City of Petersburg, that he had excellent credit and the merchants in Petersburg had a great deal of confidence in him? A. I don't remember having made any such statement as that.

(81) 21st Q. If you had made any such statement, isn't it likely that you would recall same? A. I think probably I would.

22nd Q. About what was the amount of the notes of R. Crawley Jones taken up on September 3rd, 1909, by J. Samuel Jones, the father of R. Crawley Jones? A. I don't recall the exact amount. I think it was something like $1,500 to $1,600 as I remember it. I could not tell without referring to the records the exact amount.

23rd Q. What was your opinion of R. Crawley Jones' credit at that time? A. At the time these notes were paid out?

24th Q. Yes, sir. A. Well, there was some rumor around town that Mr. Jones had been over-trading, and I can't say of any definite report that I heard about his financial circumstances, but, as I recall, there was some rumor around town that probably he had been purchasing rather in excess of his capital.

Memo: Question excepted to by counsel for Claude M. Dean as irrelevant and hearsay and the answer is not responsive to the question.

(82) 25th Q. Did you ever state to Mr. Claude M. Dean that your bank held these notes for collection and did not own them? A. I don't remember making such a statement to Mr. Dean, although some of the notes were held for collection by the bank.

26th Q. Please state whether or not you would likely remember it if you had told Mr. Dean that your bank held the notes for collection and did not own them? A. Well, I would hardly remember now in detail a conversation that occurred at that time. I would not like to state positively because I could not recall whether I made such a statement to Mr. Dean at that time. I don't remember making such a statement to him.

27th Q. If the bank had owned a part of the notes and held the other part for collection, would you have told Mr. Dean that the bank held all of the notes for collection? A. I don't think I would because it was none of Mr. Dean's business that I know of, and it is not our custom to give information of that nature unless we give it at the request of the court to a party who is not interested.

(83) 28th Q. Had you not talked with Mr. Claude M. Dean regarding these notes on the morning of September 3rd, 1909, prior to the time that Mr. J. Samuel Jones, the father of Mr. R. Crawley Jones, visited your bank? A. I recall having some conversation with Mr. Dean before Mr. Samuel Jones came to the bank on that day but I cannot state what the conversation was at this time.

29th Q. You stated that the notes were not paid the Virginia National Bank—do I understand you to mean that the notes were turned over to Mr. J. Samuel Jones with no endorsement thereon made by the bank? A. That is exactly what I mean to say.

30th Q. Why were not these notes marked paid by your bank? Am I to understand from your testimony that the bank sold the notes?

Memo: Question objected to as leading by counsel for Claude M. Dean.

A. That was our understanding of it that we sold the paper to Mr. Jones and that there was no endorsement to be made on the notes. We had nothing further to do with them after they passed from our hands.

CROSS-EXAMINATION BY MR. MEREDITH, COUNSEL FOR CLAUDE M. DEAN,

(84)

1st Q. Mr. Long, what time of the evening did Mr. Jones come there and pay those notes? A. I think it was probably about four o'clock.

2nd Q. Is that after banking hours? A. Yes, sir.

3rd Q. You were at the bank yourself? A. Yes, sir.

4th Q. Now, when Mr. Jones paid you the money did he say anything to you one way or the other about those notes? A. I don't think any comments were made after I turned the notes over to him.

5th Q. Are you certain of that? A. As I recall it, there was no further conversation between us. He bade me goodbye and went on out the bank.

6th Q. There was no conversation took place between you on this occasion. He simply gave you the money, took the notes and he bade you goodbye? A. He was only in the bank, as I recall it now, for a very few minutes, came in and called for the notes and immediately got them, turned over the money and he left.

7th Q. And nothing was said about the notes? A. I don't recall any comments upon the matter.

(85) 8th Q. Then why did you say in reply to a question of Mr. Roper that it was your understanding with Mr. Jones that these notes were not to be paid? A. Because I had a conversation before this time.

9th Q. When did you have that conversation? A. I don't recall now. We had told Mr. Jones that we wanted him to take the paper up and he said he would take it up.

10th Q. Was that all that took place in that conversation—that you had told Mr. Jones that he or his son would have to take them up, and he said they would take them up? Then the next day he came in and presented the money to you and you gave him the notes? A. He said he would come down and take the notes up and he did so.

11th Q. I again repeat my question, upon what authority do you base your statement in your direct examination that Mr. Jones didn't pay these notes, but simple bought them? A. Because the notes were not due at that time, hadn't fallen due, and the reports that I alluded to a while ago concerning the way and the manner Mr. Crawley Jones was conducting himself.

(86) 12th Q. So that your only justification for the statement that the elder Jones didn't pay these notes but took them up and bought them is that they were not yet

due and the rumor that Mr. Jones was over-trading? A. When a note is taken over before a note is due we usually call it selling paper.

13th Q. That is the only basis? A. You might term it as you please. We usually term it selling paper.

14th Q. I can term it either way I please? A. We did not endorse the paper at all. We frequently sell paper from one bank to the other, but they take it over on its merits when we make no endorsement or transfer on the paper. We call it selling paper.

15th Q. Mr. Jones didn't tell you he was going to buy it? He said he was going to take it up? A. Yes, sir.

16th Q. So there was no understanding between you and Mr. Jones about this matter about taking up and paying these notes? A. None, except that he was to take them up.

(87) 17th Q. How much paper did R. Crawley Jones have in your bank at that time? A. I think it was somewhere in the neighborhood of $1,500.00. I could tell from our records probably, but cannot recall from memory the exact amount.

18th Q. Will you please examine the records of your bank and supply the stenographer with a statement of the total amount of paper and the amount of each note, with their dates, that were taken up on the 3rd of September, 1909? A. Yes, sir. I find from an examination of the records that the first note of R. Crawley Jones discounted by the Virginia National Bank was for the sum of $650.00, dated March 3rd, 1909, at fifteen days. This note purported to bear the endorsements of W. H. Snead, J. Samuel Jones and Marie E. Jones. Said note was renewed from time to time and the last renewal for $650.00 was due on September 24, 1909. The second note of R. Crawley Jones discounted by the Virginia National Bank was for the sum of $600.00 dated June 17, 1909, at thirty days. W. H. Snead, J. Samuel Jones and Marie E. Jones purported to be endorsers on this note. Said note was renewed from time to time and the last renewal for $600.00 was due on September 17, 1909. Both of the above notes were taken up at our bank on September 3, 1909, before the same were due. The above were the only notes of R. Crawley Jones held by us on September 3rd, 1909; I am unable to find any record of any note of R. Crawley Jones which was held by the Virginia National Bank for collection on September 3rd, 1909. Since thinking over the matter I now recall that one W. W. Presson held a note of R. Crawley Jones for $500 or $600, which had been

protested at the Petersburg Savings & Insurance Co. Mr. Presson handed the note to us with the request that we collect the same for him, if possible. No record, however, was ever made of this note on the books of the bank. This note was also taken up on September 3rd, 1909, along with the first above mentioned two notes.

(88) 19th Q. The total of it, you think, was $1,500.00? A. I think it might vary about $200.00 either way.

20th Q. How much of that had the bank discounted? A. I think somewhere around $1,000.00 to $1,200.

21st Q. And the remaining $300.00 was notes held by your customers deposited for collection? A. Yes, sir.

22nd Q. The bank had discounted from $1,000.00 to $1,200.00? A. I think so. I can't be exact without referring to the records.

23d Q. Did you tell Mr. Dean how much paper there was there of R. Crawley Jones? A. I couldn't say whether I told Mr. Dean the amount of it or not. I may have told him. I don't recall.

24th Q. Did you ever see Mr. Dean before that time? A. I don't remember seeing him to know him before that time.

25th Q. Did he have a conversation with you on that day? A. He had a slight conversation with me, I think, twice,

26th Q. What was that conversation? A. He came in the morning, as I said, and inquired about Mr. Jones, Sr.,—whether I had seen him or not, but I don't recall the details of the conversation.

(89) 27th Q. Did he tell you why he was looking for Mr. Jones, Sr.? A. I don't recall.

28th Q. Did he ask you about R. Crawley Jones on that occasion? A. I don't recall the details of the conversation at all.

29th Q. Can you recall a single detail of that conversation? A. I would not like to say, Mr. Meredith, because I don't want to make a misstatment one way or the other.

30th Q. Then, if Mr. Dean testifies that you informed him that Mr. R. Crawley Jones had stood as well as any young man in the community, is he mistaken, or you just don't remember? A. I don't think I made any such statement.

31st Q. If he testifies to it, would you undertake to say that you deny it? A. I don't remember making any such statement to anyone. I would not say positively I

didn't say it. You make a casual remark about some things and in the course of time it passes out of your mind.

32d Q. Did Mr. Dean tell you what his purpose was in coming to your bank? A. I don't recall that he did. I had no transaction with Mr. Dean.

(90) 33rd Q. Did Mr. Dean explain why he was there? A. He may have, but I don't recollect that he did.

34th Q. If he says that he did explain to you why he was there, you would not undertake to contradict him? A. I have no right to contradict anything Mr. Dean says in regard to something that I said.

35th Q. You have been unable to contradict him, if he states that you informed him that R. Crawley Jones stood as well as any young man in the community. You won't undertake to deny it? A. I won't deny it emphatically, but I don't think I made the remark.

36th Q. You don't deny that Mr. Dean had some conversation with you? A. I don't deny it, but I don't recall it.

37th Q. He not only spoke to you but he conversed with you? A. For a very few minutes. I don't think he was in the bank more than five minutes, as I recall it now.

38th Q. And now you are unable to recall any of that conversation? A. I could not state the details of the conversation, except that Mr. Dean inquired for Mr. Jones.

(91) 39th Q. Did Mr. Dean ask you why the bank didn't secure itself by taking a deed of trust from Jones? A. No, sir. National Banks do not take deeds of trust.

40th Q. Did you give Mr. Dean that reason for not taking a deed of trust? A. No, sir. Nothing was ever said about deeds of trust.

41st Q. Did you tell Mr. Dean that the people who had deposited their notes for collection, some $300.00 out of $1,500.00 wanted their money in cash? A. I think I told him that they wanted their money. I don't know that I specified cash or currency.

42nd Q. You mean they wanted the money? A. Yes, sir.

43rd Q. You had already told Mr. Jones, Sr., that, hadn't you? A. Yes, sir.

44th Q. Did you tell Mr. Dean that you had been up to Darvills where Mr. Jones lived? A. No, sir. I have never been to Darvills.

45th Q. Had you sent any of your employees of the bank up there? A. No, sir; not to Darvills.

(92) 46th Q. Did you send them to old man Jones' place? A. No, sir.

47th Q. Or to this farm of Mr. Jones either? A. No, sir.

48th Q. No one representing the bank had been up there? A. No one had ever been to Crawley Jones' place.

49th Q. And you didn't tell Mr. Dean that you thought Jones had enough to pay everybody? A. No, sir, because as I say I have never seen Crawley Jones' place. I would not know it if I had seen it today. I have never been to his place.

50th Q. Did you go up in that direction? A. I have been to Mr. Samuel Jones' place.

51st Q. Did you go up to see him about this matter? A. Yes, sir.

52nd Q. Did he tell you that his son had enough to pay his creditors out if he was allowed to carry on his business? A. I don't recall whether he did or not.

53rd Q. What did he say about them? A. I don't recall what he said about his son. He said something about having endorsed some paper for him.

54th Q. Did you ask him about the payment of this money and whether his son was able to do it? A. I asked (93) him about the payment of this money and told him it must be paid. He said he would come down and take it up, to give him a day or two. I told him that was all right and he came down and took the notes up.

55th Q. Did he give you any account of his son's, R. Crawley Jones, financial condition, the store that he had and the farm that he was operating? A. He told me about his store and his place over there, but I don't recall that he told me about its value at all.

56th Q. Was Mr. Dean in the bank when Mr. J. Samuel Jones took those notes up? A. I don't recall whether Mr. Dean was present at the time or not. I am under the impression that he was not.

57th Q. How long had Mr. Jones been in business? A. I don't know.

58th Q. When was the first note that he put in there discounted by the bank? A. I could not tell without referring to the records. I will furnish the notary with this information. As to the notes taken up on September 3rd, 1909, some of these notes might be renewal notes, short time paper, which had been going on for several (94) months. All you want to know is what notes were there and whether they were due on September 3rd, and which had been discounted by the bank and which had

been put in there for collection, meaning the notes taken up by J. Samuel Jones? Ans. By counsel for Claude M. Dean: Yes.

(For answer to the above question see answer to Question 18 on page 66.)

RE-DIRECT EXAMINATION.

By BARTLETT ROPER, JR., of Counsel for Complainant:

1st Q. Please state whether or not on September 3rd, 1909, you had any knowledge whatsoever of the affairs of R. Crawley Jones. I mean if you knew anything about the amount of his liabilities and the value of his assets. A. I did not know what his liabilities and assets were at that time.

(95) 2nd Q. You are certain, Mr. Long, that on the morning of September 3rd, 1909, the date the notes were taken out of the bank by Mr. J. Samuel Jones, prior to the visit of Mr. J. Samuel Jones, Mr. Dean had been in the bank twice regarding the notes in question? A. Mr. Dean had been in the bank once I am sure, but would not say whether he was in once or twice that morning, but he was in certainly once.

3rd Q. At the time these notes were taken up on September 3rd, 1909, did I understand you to state that your bank had absolutely no knowledge whatsoever of any arrangement between R. Crawley Jones and Claude M. Dean by which Mr. R. Crawley Jones was to secure the payment of the sum of $1,600 loaned by the said Claude M. Dean and used in taking up the notes in question? A. I had absolutely no knowledge of that because we knew nothing of any transaction between Mr. Dean and Mr. Jones. The only transaction I had was with Mr. J. Samuel Jones.

(96) 4th Q. Did you ever have any talk with Mr. R. Crawley Jones in person regarding the payment of these notes? A. No, sir.

5th Q. You stated in answer to the question asked you by Mr. Meredith that you had a conversation with Mr. J. Samuel Jones two or three days prior to the date the notes were taken up. I understood you to state in your answer that Mr. Samuel Jones called the next day and took up the notes. Did you mean to state that the notes were taken up the day after your first conversation with Mr. J. Samuel Jones? A. It was either the following day or the second day after my conversation with him.

I am rather under the impression that it was the second day afterward, that is, about the 1st of September that I had this first conversation with him.

6th Q. On your visit to the home of Mr. J. Samuel Jones, did Mr. Samuel Jones give you any detail statement as to the liabilities and assets of his son, R. Crawley Jones? A. No, sir; he did not.

7th Q. Did he give you any accurate information of any kind as to the amount of the debts and assets of (97) his son? A. No, he gave me no accurate information at all. He expressed himself in a general way but not in detail at all.

RE-CROSS EXAMINATION by Mr. Meredith, Counsel for Claude M. Dean.

1st Q. Mr. Long, I hand you Exhibit "X"— Will you please look at it and tell me whether any of the members of those various firms are directors in your bank or in any other bank in Petersburg? A. Chas. Lunsford, of Chas. Lunsford & Co., is a director in the Virginia National Bank. J. E. Young, of the Virginia Dry Goods Co., is a director in the Virginia National Bank. T. F. Heath, of T. F. Heath & Co., is a director in the National Bank of Petersburg. H. P. Harrison, of H. P. Harrison & Co., Inc., is a director in the Petersburg Savings and Insurance Co. G. C. Wright, of Aug. Wright Co., is a director in the Virginia National Bank. Bartlett Roper, of Roper & Co., is a director in the Virginia National Bank. W. W. Warren, of C. C. Alley, Inc., is a director in the Virginia National Bank.

(98) *Memo*: The above question and answer are objected to by counsel for complainant as irrelevant.

And further this deponent saith not.

(By agreement of counsel the signature of the witness was waived.)

MR. W. P. WELLS, a witness of lawful age, being first duly sworn, deposes and says as follows:

1st Q. By Bartlett Roper, Jr., of counsel for complainant: Please state your name, age, residence and occupation. A. W. P. Wells, residence "Grampian Hill," Dinwiddie County, Va.

2nd Q. Were you the party substituted by the Circuit Court of Dinwiddie County in the place and stead of E. C. Dean, trustee in a certain deed of trust executed

by R. Crawley Jones and Marie E. Jones, his wife, dated September 3rd, 1909. A. Yes.

3rd Q. Did you qualify as substituted trustee and execute the required bond? A. Yes, sir.

(99) 4th Q. When you had qualified as substituted trustee, did you proceed to take charge of the property mentioned in the said deed of trust and dispose of the same? A. Yes, sir.

5th Q. Please state whether or not you were the notary public who took the acknowledgment of R. Crawley Jones and Marie E. Jones to the deed of trust aforesaid? A. Yes, sir.

6th Q. The said deed of trust, a copy of which is marked "C," purports to have been acknowledged before you on the 3rd of September, 1909. Please state if the same was so acknowledged on that date, and if not, on what date was the same acknowledged by the said R. Crawley Jones and Marie E. Jones? A. No, sir; it was on the 10th day of September.

7th Q. Then your certification as a notary public that the deed of trust was signed and acknowledged before you on the 3rd day of September, 1909, is an error, is it not? A. Yes, sir.

8th Q. Was anything said at the time this deed was signed and acknowledged by the said R. Crawley Jones and Marie E. Jones, his wife, as to the date of the month?

(100) A. Yes, sir; someone asked the date of the month, I don't recall whether it was Mr. Dean or not. Mrs. Jones said it was the 10th.

9th Q. What, if anything, did you do when you found out that there was a wrong date in the acknowledgment? A. I wrote to Mr. Dean in regard to it, that it was an error, as he put in the dates.

10th Q. How long after you had signed the acknowledgement did you find out that it was an error? A. I can't say definitely, but it was not very long. I have Mr. Dean's letter where he was in New York he wrote me that he was glad I called his attention to it, that it was inadvertently done as he put the same date in it when he wrote the deed.

11th Q. Did you call Mr. Dean's attention to the error, or did he call your attention to the error? A I called his attention to it. His letter shows that.

12th Q. Who filled in the notary acknowledgment? A. Mr. Dean filled it all in. All I did was to sign it as notary public.

13th Q. Why did you sign the notary acknowledg-

(101)—ment before reading it? A. It was mere negligence. I had such confidence in the party who put in the dates I took it for granted that he had it right. He said I just had to sign my name.

14th Q. Then I understand that you relied upon Mr. Dean filling in the notary acknowledgment correctly? A. Implicitly.

15th Q. And on the strength of that you signed the notary acknowledgement? A. I did.

16th Q. Did I understand you correctly to state that just before you signed the notary acknowledgment someone asked what date it was and you think Mrs. R. Crawley Jones remarked that it was the 10th? Did I understand you correctly? A. You are correct.

17th Q. How long have you lived in Dinwiddie County, Mr. Wells? A. All of my life.

18th Q. How far from the farm formerly owned by R. Crawley Jones, containing 201 acres? A. Well, about one mile from the residence, I suppose. Our farms adjoin, that is, that farm and mine adjoin.

(102) 19th Q. What property did you dispose of, covered by the deed of trust of September 3rd, 1909, in which deed of trust you were substituted as trustee in the place of E. C. Dean, the trustee named in the said deed of trust? A. I disposed of the stock of goods, crop of corn and tobacco and some hogs.

20th Q. Which of the property embraced in the deed of trust did you not sell? A. Right much. The real estate was in there. I didn't sell any of that.

21st Q. Did you sell the household and kitchen furniture mentioned therein? A. No.

22nd Q. Did you sell the store accounts due R. Crawley Jones mentioned therein? A. No, but some of those were collected. I collected a good many of those.

23rd Q. Please state about the amount of store accounts you did not sell or collect. I mean approximately. Of course, I do not expect you to state accurately the amount of store accounts not sold. A. I don't know how I could approximate those that were on the books and collected. Every day some were coming in and paying, but I think the amount was small.

(103) 24th Q. What did you do with the household and kitchen furniture and store accounts which you did not collect, embraced in the said deed of trust? A. They were all turned over to Mr. Crawley Jones, and I have his receipt here to witness, a copy of which I file with this deposition, marked "W. P. W. No. 1."

25th Q. Why did you turn these accounts over to Mr. R. Crawley Jones, together with the house and kitchen furniture? A. I refused for some little time. I didn't know whether I was justifiable as substituted trustee to turn them over to him at that time. He went over to see Mr. Claude M. Dean and brought me a letter in which Mr. Dean advised me to turn over such property. The letter I have here with me, copy of which said letter I file herewith marked Exhibit "W. P. W. No. 2."

26th Q. What became of the balance of the property mentioned in the deed of trust. Was all of the same sold by you? A. Except what I turned over to Mr. Jones.

27th Q. You turned over to Mr. Jones the store accounts and certain household and kitchen furniture. Was the balance of the property mentioned in the deed of (104) trust sold by you? A. No, sir. Some of the real estate was sold by Mr. Quicke as trustee for Mr. Blakey.

28th Q. With the exception of the store accounts, household and kitchen furniture and real estate, was the balance of the property mentioned in the said deed of trust sold by you? A. I think so.

29th Q. Please state if you know the gross amount realized by you from the sale of the property mentioned in the deed of trust since you state that all of the property mentioned therein, with the exception of the household and kitchen furniture, store accounts and real estate, was sold by you. A. $1,934.75.

30th Q. Do you know how much was realized by you from the sale of the crops of corn and tobacco? State approximately, if you know. A. $210.00 from the crops.

31st Q. Do you know the total amount realized by you? A. $1,934.75.

32nd Q. Then the balance of the money realized by you was realized from the other property mentioned in the deed of trust, with the exception of the real estate, household and kitchen furniture and store accounts, (105) which you did not sell? A. Yes, sir.

33rd Q. Please state why you did not sell the real estate mentioned in the deed of trust. A. Because there was a deed prior or ahead of this deed. At one time we decided to sell it but Mr. Jones kicked on it, and then Mr. Blakey came in and sold it.

34th Q. Do I understand from your answer that you mean that there was a prior deed of trust held by Mr. Blakey on the real estate? A. A prior deed of trust.

35th Q. Did you make an inventory of the stock of goods? A. Yes, sir. There was an inventory made.

36th Q. At what prices were the articles put down in the inventory you made of the stock of goods—at retail or wholesale prices? A. At wholesale prices.

37th Q. What do you mean by wholesale prices—do you mean the price paid for the goods by R. Crawley Jones or as near that price as you could get at? A. Yes, sir.

38th Q. Mr. Wells, you states that you have lived in Dinwiddie County all your life, about one mile from where R. Crawley Jones conducted the merchandise busi-
(106) ness, at or near Darvills, Va., and that your farm adjoined his farm. Please state whether or not you knew of any other property of any kind or description in Dinwiddie County owned by R. Crawley Jones on September 3rd, 1909, that was not embraced in and included by the said deed of trust of September 3rd, 1909. A. I do not.

39th Q. Mr. Wells, I hand you a paper marked Exhibit "X," which is one of the original schedules filed by the said R. Crawley Jones in the United States District Court for the Eastern District of Virginia on the 23rd day of March, 1911. Please look at the paper marked "Open accounts due by last address," and state which of these accounts in your opinion can be collected, giving the name and the amount as it appears on said statement.

Memo: Question and answer objected to by counsel for Claude M. Dean because the trustee is now *functus officio* and has not been put in as an expert in mercantile accounts and no evidence of such expertness has been offered.

(107) To which counsel for the complainant replies that the witness has stated that he has lived in Dinwiddie County all of his life, and, while he is not put on as an expert, having lived in Dinwiddie County for forty years or more, it is reasonable to presume that he knows the people of his county and their financial standing and responsibility, and we ask him the question not as an expert but as a party having knowledge of the financial condition and standing of people in Dinwiddie County, where the paper shows most of the parties reside.

A. It is so near all that are no good I would say all.

40th Q. Do you know the parties whose names are mentioned on the list and their responsibility, so far as this world's goods are concerned? A. I think so.

41st Q. Were there any other accounts than those

mentioned on that list turned over by you to Mr. R. Crawley Jones? A. I could not say.

42nd Q. Do you know whether Mr. R. Crawley Jones, after you turned over the accounts to him, ever collected any of the accounts that were turned over by you? A. He collected an account from Everette Tucker. I was just looking to see if his name was on here, but I failed to see his name.

(108) 43rd Q. About what was the amount of the Tucker account? A. It was small—possible two or three dollars.

1st Q. By Mr. Davis, of counsel for complainant: Mr. Wells, I understood you to say something about Mr. Dean's filling in some blanks in that deed. Did you see the deed before it was executed? A. No, only Mr. Dean was writing on the table.

2nd Q. Was it all in typewriting? A. No, sir.

3rd Q. What parts were written in Mr. Dean's handwriting? A. I couldn't say, but all I could see was written with a pen.

4th Q. Do I understand that you didn't see any typewritten part? A. Not that I remember.

5th Q. Was the part which you say was in handwriting the description of the property that was conveyed? A. I couldn't say. On the back of this deed, Mr. Davis, I suppose down about that much on the sheet (indicating about eight or ten inches), where he finished it up with the notary acknowledgment, and handed it to me to sign and I signed it.

(109) 6th Q. Was that notary acknowledgment—any part of it, typewritten? A. I couldn't say. I don't think so. I think he was using a pen and I think he wrote it all out with the pen—this as I recall it now.

Cross Examination by Mr. Meredith, Counsel for Claude M. Dean.

1st Q. Mr. Wells, will you please look at the paper I hand you and see if that is not an inventory of the stock of goods taken by you when you took charge of the store of R. Crawley Jones? A. I wish to state here that this commenced before I went in. I appointed a man to go there.

2nd Q. But that is the inventory that was made out by the man that you put in—in Jones' store? A. I think so.

3rd Q. What is the total amount of the value of the goods in that store as found by the inventory? A. It says $2,607.76.

4th Q. Those goods you say were inventoried at wholesale prices—not retail prices? A. Yes.

(110) 5th Q. Were they inventoried at the wholesale prices, or at 25 per cent. thereof, or what? A. They were inventoried at the cost price.

6th Q. Then in some cases didn't you strike out as much as 50 per cent? Question by witness: In selling? A. By counsel for Claude M. Dean: I mean in making up the inventory. A. In some hats we struck off 50 per cent. They were ladies' old hats that had been there sometime.

7th Q. Was there anything else that you cut down to 35 per cent.? A. I could not tell.

8th Q. As a matter of fact, as the inventory shows a great many of the inventory price were cut down from 35 per cent. to 50 per cent.? A. Yes, sir.

9th Q. You have settled your accounts as trustee, haven't you? A. Yes.

10th Q. Have you a copy of the account rendered and certified? A. Yes, sir; and I herewith file a copy of the same marked Exhibit "W. P. W. No. 3."

11th Q. Mr. Wells, Mr. Jones was engaged in two occupations, won't he? A. Yes, sir.

(111) 12th Q. He was keeping that store and then he was running the farm? A. Yes.

13th Q. Was the farm apparently a prosperous farm, with good crops on it, when he was up there? A. Fairly good.

14th Q. What amount of cultivation did he have there on the farm? A. I suppose about 25 acres, something like that. I couldn't say positively.

Memo: The foregoing question and answer are objected to by counsel for complainant on the ground that the same are immaterial and irrelevant to the matter at issue.

15th Q. You have testified already in this matter—in the bankruptcy proceedings against Mr. Jones? A. Yes, sir.

16th Q. On the former examination you were asked this question, "Did you know it subsequently by virtue of your trusteeship?" and you answered, "No, sir. I have seen a statement since then but at the time of this trusteeship we talked the matter over and I thought possibly if he did not owe me over $3,000 and had gone on (112) with the business in the natural course that those goods would have possibly made him solvent if his debts

did not exceed $3,000.00." That was your answer, was it not? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Roper, of Counsel for Complainant.

1st Q. Who made that inventory which was handed you a few minutes ago by counsel for Claude M. Dean? A. My cousin, F. A. Wells, who was in charge of the taking of inventory, R. C. Jones, Organ Jones and Miss Mollie Dean.

2nd Q. Was any part of this inventory made before you qualified as substituted trustee? A. I think not.

3rd Q. Was Mr. R. Crawley Jones employed at the store-house, while the goods were being sold, as a clerk by you? A. Part of the time.

4th Q. Who staid at the store-house at night? A. Mr. Organ Jones slept over the store.

5th Q. Did Mr. R. Crawley Jones stay there too? A. He staid at his house.

6th Q. How far is the house from the store-house? (113) A. I would say about eighty or one hundred yards.

7th Q. What relation is Organ Jones to R. Crawley Jones? A. They are half brothers.

8th Q. Did anyone stay in the store-house at night besides Organ Jones? A. Not that I know of.

9th Q. Who kept the keys to the store-house? A. I kept them.

10th Q. Did you keep the keys to the back as well as to the front? A. The front door was fastened with a bar across it on the inside and the back doors were the doors that I had the keys to.

11th Q. You are familiar, are you not, Mr. Wells, with the stock of goods which you sold as substituted trustee? Do you know whether or not there were in the stock of goods any goods of creditors which had not been paid for, or, in other words, do you know whether there was in the stock of goods goods purchased from creditors who had not received payment for same? A. Not of my personal knowledge.

(114) *Memo*: The foregoing answer is objected to as being hearsay and improper evidence.

12th Q. Then you do know that goods were recently received from merchants in the City of Petersburg at the store-house and the same were included in the stock of goods inventoried by you? A. Yes.

13th Q. How recently were any goods received there? A. I could not attempt to say.

14th Q. Within thirty days? A. I would rather not say. I don't know.

15th Q. What was the condition of that stock of goods? Was it a new stock or was it a stock that had been used by a predecessor in conducting the business at that stand? A. It had been used by several. While he had some new goods he had a lot of it that was comparatively worthless—about 25 per cent.—that is, a small part of it.

16th Q. Were any of those goods in the stock when A. L. Bragg conducted a retail merchandise business at that stand? A. No, sir.

17th Q. Were any of the goods there when Mr. West conducted the store at that stand? A. I think not.

(115) 18th Q. Were any there when the business was conducted by Riley, Hamlet Co.? A. Yes, sir.

19th Q. Do you know the names of the colored drivers who drove the team at that time for J. Samuel Jones, who lives at Zero, Brunswick County, Va.? A. I don't know any of them.

20th Q. Do you know, Mr. Wells, of any goods that were hauled away from that store to Brunswick County? A. No, sir, I do not, only what I sold that I saw being hauled away.

21st Q. Did Mr. R. Crawley Jones give more of his time to, and realize more money from, the farm or from the store—from your personal observation? A. I don't know. I know this that those who lived there before depended on the store. His time was about divided between store and farm.

Re-Cross Examination by Mr. Meredith, Counsel for Claude M. Dean

1st Q. Did he farm more than any other man that you (116) knew on that farm? A. Up to that time, I think so.

And further this deponent saith not.

(By agreement of counsel the signature of the witness was waived.)

Memo: It is agreed between counsel that:

C. C. Alley, Inc., are fancy grocers of the City of Petersburg, Va.; W. E. Armstrong & Co. are druggists of the City of Petersburg, Va.; James H. Bailey is a dealer in crockery, of the City of Petersburg, Va.; Burr Mfg. Co. are dealers in cider; D'Alton & Co. are wholesale grocers in the City of Petersburg, Va.; D. M. Ferry & Co. are seed merchants; John A. Gill & Co. are wholesale grocers in the City of Petersburg, Va.; T. F. Heath & Co. are wholesale feed dealers in the City of Petersburg, Va.; H. P. Harrison Co., Inc., ar wholesale fancy grocers in the City of Petersburg, Va.; R. E. Lunsford & Co., are wholesale and retail hat merchants in the city of Peters-
(117) burg, Va.; Chas. Lenard Hardware Co., Inc., are wholesale and retail hardware merchants in the City of Petersburg, Va.; Chas. Lunsford & Co. are wholesale feed merchants in the City of Petersburg, Va.; W. H. Miles Shoe Co. are wholesale shoe merchants in the City of Richmond, Va.; National Cash Register Co. are manufacturers of cash registers: National Biscuit Co. are manufacturers of biscuits; Petersburg Hardware Co. are wholesale and retail hardware merchants of the City of Petersburg, Va.; Petersburg Dry Goods Co. are wholesale dry goods merchants, formerly of the City of Petersburg, Va., but now of Richmond, Va.; Roper & Co., Inc., are wholesale grocers, of the City of Petersburg, Va.; Smith Bros. & Co. are produce commission merchants, of the City of Petersburg, Va.; Standard Oil Co. is a dealer in oils; Virginia Dry Goods Co., Inc., are wholesale dry goods merchants, of the City of Petersburg, Va.; Au-
(118) gustus Wright Co. are wholesale shoe merchants, of the City of Petersburg, Va.; J. B. Worth & Co. are manufacturers of ice, of the City of Petersburg, Va.

The following is to be received as the deposition of Mr. W. A. Thomas:

He visited the store of R. Crawley Jones just before the deed of trust of Claude M. Dean was executed and looked over the stock of goods and saw that the same contained a great many goods of the merchants of the City of Petersburg, which had not been paid for. Mr. Thomas also states that Mr. Bartlett Roper, Jr., in a letter dated November 16th, 1909, received from Mr. R. Crawley Jones the following statement of his indebtedness:

Q. How did you know so much about these different people? A. He told me his indebtedness before I went

up to see him. He had a statement in his own handwriting.

Q. Have you got that statement with you? A. Mr. Roper has it. (Read statement as follows):

COMPLETE CERTIFIED LIST OF R. C. JONES' CREDITORS UNSECURED.

Kirkham & Co.,	Petersburg, Va.,	$	9 50
Home Brewing Co.,	" "		8 00
Chas. Lunsford & Co.,	" "		10 77
T. F. Heath & Co.,	" "		123 30
The Fraser-Binford Co.,	" "		3 25
(119)			
Peterson & Jefferson,	" "		5 00
Standard Oil Co.,	" "		30 39
W. Grossman & Co.,	" "		133 18
Fleming & Christian Co.,	Richmond, Va.,		37 13
Burr Mfg. Co.,	" "		34 85
W. H. Miles Shoe Co.,	" "		54 00
J. B. Worth Co.,	Petersburg, Va.,		59 00
Va. Dry Goods Co., Inc.,	" "		362 15
Smith, Robertson & Gill,	" "		11 55
H. P. Harrison Co., Inc.,	" "		30 10
Petg. Hardware Co.,	" "		98 21
Robinson & Purdy Corp.,	" "		28 20
Jas. H. Bailey,	" "		42 03
W. Y. Burge & Co.,	" "		36 65
National Biscuit Co.,	" "		2 19
R. E. Lunsford & Co.,			96 58
Aug. Wright Co.,			542 85
Petg. Coca-Cola B. Works,			4 80
F. F. Thweatt & Bro.,			21 95
Roper & Co.,	Petersburg, Va.,		234 77
W. E. Armstrong & Co.,	" "		19 34
Petg. Dry Goods Co.,	" "		449 25
Jno. A. Gill & Co.,	" "		204 02
C. C. Alley, Inc.,	" "		64 16
D'Alton & Co.,	" "		220 99
Chas. Leonard Hwd. Co.,	" "		102 15
Petg. Gas. Co.,	" "		38 89
Petg. Telephone Co.,	" "		5 30
(120)			
T. H. Titmus,	" "		11 50
Whitehorne & Scoggin,	" "		5 63
Harlow-Willcox & Co.,	" "		74 38
J. Gordon Rennie, M. D.,	" "		115 00
W. H. Snead,	" "		135 00

Craddock & Jones,	" "	200 00
R. E. Blakey,	" "	2,250 00
Brown Mfg. Co.,	Greenville, Tenn.,	29 85
Seay-Dillard Hwd. Co.,	Blackstone, Va.,	69 68
Stokes-Williams & Co.,	" "	60 45
Dinwiddie Telephone Co.,	DeWitt, Va.,	21 15
P. H. Thomas,	Wellville, Va.,	24 00
J. S. Jones,	Zero, Va.	325 00
C. R. Jones,	Ordsburg, Va.,	500 00
T. J. Callis,	" "	500 00
Kent Furniture Co.,	Petg., Va.,	51 45
		$7,497 59
W. H. Harrison Co.,	" "	9 80
D. M. Ferry & Co.,	Detroit, Mich.,	8 47
National Cash Register Co.,	Dayton, O.,	150 00
		$7,665.86

Q. What is the date of that statement? A. November 16, 1909."

(121) **EXHIBIT B. C. S. "A".**

"April 12th, 1911. Appointed said R. B. Davis, Jr., Trustee, and fixed the penalty of his bond at $500, whereupon said Davis tendered a bond in said penalty conditioned as required by law with the United States Guaranty & Fidelity Company, of Baltimore, Md., as his surety, which bond being approved by the referee, was received and filed."

I, B. C. Syme, Referee in Bankruptcy, to whom the matter was referred after the death of George S. Bernard, do hereby certify that the above is a true copy of an entry made in the book of proceedings kept by said George S. Bernard, Referee in Bankruptcy (now deceased), in the matter of R. Crawley Jones, Bankrupt, now on file in my office.

Given under my hand this 26th day of October, 1912.

BERNARD C. SYME,
Referee in Bankruptcy, located
at Petersburg, Va.

(122) **EXHIBIT B. C. S. "B."**

STATEMENT SHOWING PROOF OF UNSECURED DEBTS DULY FILED WITH AND ALLOWED BY GEO. S. BERNARD, REFEREE IN BANKRUPTCY (NOW DECEASED), IN THE MATTER OF R. CRAWLEY JONES, BANKRUPT, ALSO SHOWING THE DATES WHEN SAID DEBTS WERE CONTRACTED.

Name.	When Contracted.	Amount.
C. C. Alley, Inc.	June, July & Aug. 1909,	64.16
W. E. Armstrong & Co.	Prior to April, 1909,	19.34
R. E. Blakey	Feb 20th, 1909 (2 notes) Payable 1 & 2 years after date, made by R. C. Jones & wife & endorsed by J. S. Jones & Nettie Jones.	2,250 00
Jas. H. Bailey	Date does not appear,	42 03
Burr Mfg. Co.	April to July, 1909,	37 80
D'Alton & Co.	June & Aug., 1909,	220 99
D. M. Ferry & Co.	Dec. 9, 1908,	8 47
Jno. A. Gill & Co.	May, June & July, 1909,	204 02
T. F. Heath & Co.	July & August, 1909,	123 30
H. P. Harrison Co., Inc.	July 9th, 1909,	30 10
R. E. Lunsford & Co.	April & May, 1909,	96 58
Chas. Leonard Hdw. Co., Inc.	July & August, 1909,	102 15
Chas. Lunsford & Co.	Prior to Aug. 9th, 1909	10 77
W. H. Miles Shoe Co.	May 12th, 1909,	54 00
National Cash Register Co.	Aug. 1st, 1909,	60 00
National Cash Register Co.	Aug. 21st, 1909,	90 00
National Biscuit Co.	June 30th, 1909,	2 19
Petersburg Hardware Co., Inc.	April, May, June & July, 1909,	98 21
Petersburg Dry Goods Co.	April, May, June & July 1909,	438 86
Roper & Co., Inc.	June, July & August, 1909,	234 77
Dr. Jno. G. Rennie	June 18, 1908, to April 25, 1910,	193 00
Smith Bros. & Co.	Date does not appear,	11 55
Standard Oil Co.	June & July, 1909,	30 57
B. E. Tucker	Prior to Sept. 3rd, 1909,	7 22
Va. Dry Goods Co., Inc.	May & July, 1909,	362 15

Aug. Wright Co.	April, May, July & Aug., 1909,	542 85
J. B. Worth Co.	June to Aug. 31st, 1909,	59 00
		$5,394 08

(123) I, B. C. Syme, Referee in Bankruptcy, to whom the matter was referred after the death of George S. Bernard, do hereby certify that, according to the records on file in my office, the above unsecured claims were duly filed with and allowed by said George S. Bernard, Referee in Bankruptcy (now deceased), in the matter of R. Crawley Jones, Bankrupt; that according to the statements filed with the proofs of said debts, the above statement shows the correct dates when said debts were contracted by said R. Crawley Jones; and I further certify that the records on file in my office show that all of the above mentioned unsecured claims with the exception of the two claims of the National Cash Register Co. and the claim of the National Biscuit Co. were filed with and allowed by said George S. Bernard, Referee in Bankruptcy (now deceased), at the first meeting of the creditors of R. Crawley Jones, Bankrupt, held on April 8th, 1911, before said George S. Bernard, Referee.

Given under my hand this 26th day of October, 1912.

BERNARD C. SYME,
Referee in Bankruptcy.

(124) **J. M. Q. No. 1.**

DEED OF TRUST FROM R. CRAWLEY JONES AND WIFE TO JAMES M. QUICK, TRUSTEE, DATED FEB. 20, 1909.

THIS DEED OF TRUST, made this twentieth day of February, in the year 1909, by and between R. Crawley Jones and Marie E. Jones, his wife, parties of the first part, and James Quicke, Jr., Trustee, party of the second part, all said parties being of the City of Petersburg, Virginia.

WITNESSETH, that, for and in consideration of the debt and trust hereinafter mentioned and created, and of the sum of Five Dollars to them cash in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part do hereby grant and convey, with general warranty, unto the said party of the second part, said James M. Quicke, Jr., Trustee (hereinafter referred to as said trustee), the following described property, to-wit:

All that certain tract or parcel of land lying, being and situate in Darvills magisterial district, in the County of Dinwiddie and State of Virginia, known as Darvills tract, containing two hundred and one (201) acres, be the same more or less, situated on the Cryer's Road and bounded as follows: On the North by Butterwood Road and the lands of G. E. Eckles, on the East by the lands of Heartwell and Pompey Mosley, on the South by the lands of the Baptist parsonage and the lands of P. H. Thomas, and on the West by the lands of J. T. Vaughan and Butterwood Road; the land hereby conveyed being identically the same land that was conveyed to said R. Crawley Jones by Robert E. Blakey and wife by deed of the same date herewith, and which is to be recorded along with or ahead of this deed, to which said deed reference is hereby made for all purpose of description;

Also two gray mules, one red cow, one black cow, one double farm wagon and one set of double harness, one Dayton wagon and set of single harness, one surry and set of harness, one saddle and bridle, one mower, one planter, one two-horse rake, one drag, six plows, two cul-
(125) tivators, one lot of hoes, rakes and pitch-forks, and all farming implements, tools, axes, and hatchets on the land hereinbefore described, one double barreled shotgun, two bed-steads and two mattresses, one folding bed, and one drugget, all the said personal property hereby conveyed being located and situated on the land hereinbefore described, and being the same that was conveyed to said R. Crawley Jones by Robert E. Blakey and wife by their aforesaid deed of the same date herewith;

Also any and all crops that may be growing upon and unsevered from the said land at the time of any sale of the said land that may be made by the said trustee under this deed of trust in pursuance of the terms thereof as hereinafter provided.

In Trust, nevertheless, to secure the payment of three certain negotiable promissory notes, of even date herewith, for the sum of One Thousand Dollars ($1,-000.00) each, made by the said R. Crawley Jones, payable to his own order at the Petersburg Savings and Insurance Company, of Petersburg, Virginia, on or before three, four and five years after date, respectively, with interest thereon from date at the rate of six per centum per annum, said interest being payable annually, and duly indorsed by said R. Crawley Jones, all said notes being given for, and in evidence of part of the purchase

price of the land and personal property hereinbefore described, this day conveyed as aforesaid to said R. Crawley Jones by said Robert E. Blakey and wife by their aforesaid deed of the same date herewith; to secure the payment of any notes that may be taken hereafter in renewal of said notes, or any of them, in whole or in part; and to secure the cost of executing this trust, including the usual commission of five per centum of his receipts to the trustee for his services; and for the payment of the debt and notes and costs hereby secured the said parties of the first part hereby severally waive the benefit of their homestead exemptions.

(126) In the event that default shall be made in the payment of the notes aforesaid, or of any of them, or any note or notes that may be taken hereafter in renewal of them, or of any of them, in whole or in part, or of any instalment of interest thereon, as the same shall become due and payable, then the whole of said debt and all said notes hereby secured shall become due and payable at once at the option of the owner or holder thereof, or of any of them, and the said trustee, upon being requested so to do by the owner or holder of said notes, or of any of them, hereby secured, so due and unpaid, or the interest upon which is so due and unpaid, shall take possession of the real and personal property hereby conveyed and all the crops then growing upon, or unsevered from the said land (all right and claim to which said crops then upon said land are hereby waived by said parties of the first part), and sell the same as a whole or in parcels, either privately or by public auction after such advertisement, if sale be by public auction, at such time and place, and upon such terms as to cash and credit and time of payments and security for deferred payments, if any, as to said trustee may seem reasonable and to the best interests of the parties concerned, and out of the proceeds of such sale, or out of any money that may be derived from losses by fire under policies of insurance upon improvements on the land hereinbefore conveyed, shall first be paid the costs of executing this trust, as aforesaid, then shall be paid the debt and notes aforesaid, and interest thereon, hereby secured, said notes to be paid in the order of their maturity according to the terms of said notes, and the residue, if any, shall be paid to the said R. Crawley Jones, his personal representatives or assigns.

The said parties of the first part hereby covenant that, during the continuance of this trust, they will pay

all taxes, levies, assessments and charges upon the property hereinbefore conveyed, and will also, during the (127) continuance of this trust, keep the dwelling house upon said land constantly insured in an amount not less than One Thousand Dollars and the mercantile storehouse upon said land constantly insured in an amount not less than Five Hundred Dollars, the policy or policies to be payable to the said trustee as his interest may appear as and for additional security; and in the event said parties of the first part shall fail to pay said taxes, levies, assessments and charges, or any of them, for a period of six months after the same shall have become due and payable, or shall fail to keep up constantly said insurance in the amount hereinbefore named and pay the premiums therefor when the same become due and payable, then and in such event the said trustee is authorized so to do upon the request of the owner or holder of said notes, or of any of them, hereby secured, charging said taxes, levies, assessments and charges and the premiums for such insurance to the costs of this trust, or, at the election of the owner or holder of said notes, or of any of them hereby secured, the whole of said debt and all said notes, hereby secured, shall become due and payable immediately, and the said trustee is hereby authorized and empowered, upon such election and request of the owner or holder of said notes, or any of them, hereby secured, to proceed to execute this trust as aforesaid in the same manner and with the same force and effect as in case of a default in the payment of the said debt or notes, or interest thereon, hereby secured, as herinbefore provided.

WITNESS The following signatures and seals:

R. CRAWLEY JONES. (Seal)

(128) MARIE E. JONES. (Seal)

STATE OF VIRGINIA,

City of Petersburg, To-wit:

I, C. H. PYLE, a notary public within and for the City of Petersburg, in the state of Virginia, do hereby certify that R. Crawley Jones and Marie E. Jones, his wife, whose names are signed to the foregoing and hereto annexed writing, bearing date on the 20th day of February, 1909, have severally acknowledged the same before me in my city and State aforesaid.

My term of office expires on the 8 day of July, 1909.

Given under my hand this 30th day of March. 1909.

C. H. PYLE,
Notary Public.

VIRGINIA: In the Clerk's Office of Dinwiddie Circuit Court, March 31st, 1909.

This Deed of Trust from R. Crawley Jones & wife to James M. Quicke, Jr., Trustee, was this day lodged in the said office and with the Certificate annexed admitted to record.

Teste: A. M. Orgain, Clerk.

In Clerk's Office,
Brunswick Circuit Court, Jan'y 28th, 1910.

This Deed of Trust from R. Crawley Jones & Wife to R. E. Blakey was presented in said office for record, and, together with the certificate thereon admitted to record.

Teste: R. Turnbull, Clerk.

I hereby certify that the above is a true copy of the deed of trust from R. C. Jones and wife to James M. Quicke, Jr., Trustee, dated the 20th day of February, 1909.

ALMA E. ANDREWS,
Notary Public.

(129) **EXHIBIT "W. P. W. No. 1."**

Received of W. P. Wells Fifty-Six 95/100 dollars and the remainder of the property of all kind whatsoever put in his hands by myself and wife as trustee to a certain deed of Trust for the benefit of Claude M. Deane. This property returned to me is what was left over after paying said Claude M. Deane. Also, received of W. P. Well in full for all store acct. up to date. This Feb. 7th, 1910.

R. Crawley Jones,
C. R. Jones.

Witness.

I hereby certify that the above is a true copy.

ALMA E. ANDREWS,
Notary Public.

(130) **EXHIBIT "W. P. W. No. 3."**

THE TRUST FUND OF ROBERT CRAWLEY JONES AND MARIE E. JONES, HIS WIFE.

In account with W. P. Wells, Substituted Trustee.

1909
Dec.

By amount from sale of goods in store	1,080	37
By amounts collection from various parties	764	38

" sales of tobacco			90 00
To paid R. C. Jones	4 00		
" phone message	40		
" paid F. A. Wells for services	3 00		
" " John Moyler, Ag't., premium on bond	50 00		
" " labor on farm	26 18		
" " phone message	20		
" " J. O. Jones, clerk hire	15 22		
" " R. R. fare to Blackstone	50		
" " " " " " Petersburg	2 25		
" " phone message	20		
" " expenses to Petersburg	1 40		
" " phone message	40		
" " expenses to Richmond	2 40		
" " J. G. Whitman, services at sale	4 00		
" " R. J. Wainwright, services at sale	5 00		
" " Blackstone Courier, printing	1 25		
" " phone message	20		
" " postage	1 32		
" " A. G. Butterworth, auctioneer	30 00		
" " J. W. Baskerville, Clerk at sale	2 00		
" " R. C. Jones	56 95		
" " John Moyler, Ag't., premiums on bond of trustee	100 00		
" " taxes for 1910	21 00		
" " " " 1911	22 40		
" Trustee's Coms. on $2,071.86	103 59		
" amount retained to pay Commr. & Clk. for this acct.	6 00		
By accrued interest on fund deposited in National Bank of Blackstone			137 11
Amts, forward	$459 86	$2,071 86	

I hereby certifiy that the above is a true copy.

ALMA F. ANDREWS,
Notary Public.

(131) Continued—

Amount brought forward	459 86	2,071 86

Balance due by the trustee, on deposit in National Bank of Blackstone	1,612 00	
	$2,071 86	$2,071 86

1912
Feb. 13

By balance due by the Trustee on deposit	1,612 00
" amount to be refunded by John Moyler, agent, on premiums paid on bond	20 00
	$1,632 00

I hereby certify that the above is a true copy.
ALMA E. ANDREWS,
Notary Public.

(132) **DEPOSITION OF J. W. LONG IN REBUTTAL**

Filed in Open Court Feb. 15, 1913.

JOHN W. LONG, being first duly sworn, deposes and says, as follows:

1st Q. By Bartlett Roper, Jr., Counsel for R. Beale Davis, Jr., Trustee, Complainant: You are the same Mr. John W. Long who has already testified in this matter, are you not? A. Yes, sir.

2nd Q. Mr. Long, Mr. Claude M. Dean in his testimoney given on December 2nd, stated that at the time he consulted with you as Cashier of the Virginia National (133) Bank on September 3rd, 1909, the time the notes of R. Crawley Jones, held by the Virginia National Bank, were taken up, you led him to believe that all of the notes taken up on that day were due on that day. Did you say or do anything during any of the interviews had by you with Mr. Dean on September 3rd, 1909, or any other time, that could have in any way led him to believe that the notes of R. Crawley Jones taken up by J. Samuel Jones were due on that day? A. No, sir, I did not.

3rd Q. Did you tell him that all of the notes were due on that day? A. No, sir, I did not.

4th Q. Mr. Long, Mr. Dean stated in his testimony that at the time he consulted with you as Cashier of the Virginia National Bank on September 3rd, 1909, you told him that Mr. R. Crawley Jones stood well as a young man in the City of Petersburg, that he had excellent credit and the merchants in Petersburg had a great deal of confidence in him. I now ask you to state whether or not

you made any such statement to Mr. Dean. A. I don't
(134) recall having made any such statement to him, Mr. Roper. I don't think I did.

5th Q. Why do you think that you did not make such a statement to him. Have you any reason for believing that you did not? A. The reason that I have for believing that I didn't make such a statement is that just at that time there was some report around town about Mr. Jones' inability to meet his obligations—right at that particular time. I can't say positively, but I don't believe that I would have made such a statement in the face of the rumors at that time.

6th Q. On September 3rd, 1909, was the note of R. Crawley Jones, which was held by W. W. Presson, due and who had the same? A. That was a past due piece of paper, as I recall it, that had been held by the Petersburg Savings & Insurance Company's Bank for collection, and he handed it over to me that day or the day before to collect.

7th Q. Was any note of that paper made on the records of the bank? A. No, sir, not of Presson's paper. It was a protested or past due paper, as I recall it. I think it was. I am sure it was.

(135) 8th Q. Did you ever tell Mr. Claude M. Dean at the interview had with you on September 3rd, 1909, that you had been up to Mr. R. Crawley Jones' place and investigated, and it was your opinion that he had plenty to pay everybody? A. No, I never told him that.

9th Q. Mr. Claude M. Dean, in his testimony, states that he asked you why the bank did not take a deed of trust and you stated to him that the parties for whom you were collecing the notes wanted the cash money. Did you make any such statement as that? A. No, sir.

10th Q. Mr. Long, is there any reason why the notes which were taken up at the Virginia National Bank on September 3rd, 1909, could not have been marked paid? Would it have been convenient for you to have stamped the notes paid if that had been the agreement and they had been paid? A. It was convenient for me to get the stamp all right, but that was not the understanding with Mr. J. Samuel Jones, and as I stated in my former evidence, the notes, with the exception of one—I think probably one of the notes might have been due that day, but I am not positive—but I am sure the other notes were not due at that time.

(136) 11th Q. Mr. Long, I would thank you to read your answer to Question 18 in your evidence already given in

this cause and state when the note of R. Crawley Jones for $650.00 held by the Virginia National Bank and the note of R. Crawley Jones for $600.00 held by the Virginia National Bank became due? A. The $650.00 note was due on September 24, 1909, and the $600.00 note was due September 17, 1909, so that neither of those notes were due on the 3rd of September, 1909. That was what I thought.

12th Q. This statement that you have just read, was it not made by you after you had examined the records of your bank? A. Yes, sir.

13th Q. In all your dealings as Cashier of the Virginia National Bank regarding the taking up of the notes of R. Crawley Jones that were taken up on September 3rd, 1909, did you have any dealings whatsoever with R. Crawley Jones? A. No, sir. I have never seen Mr. R. Crawley Jones in the Virginia National Bank since that time or several days prior to that time, that I recall.

(137) 14th Q. Then all your dealings regarding the taking up of these notes were had with parties other than R. Crawley Jones? A. Yes, sir.

15th Q. With whom were all your dealings had regarding these notes? A. My dealings were with Mr. J. Samuel Jones—I think that is his name—the father of R. Crawley Jones.

16th Q. Mr. Long, did you know of any arrangement whatsoever between Mr. R. Crawley Jones and Claude M. Dean by which Mr. Dean was to advance certain money to help take up these notes and Mr. R. Crawley Jones was to give him a deed of trust on stock of goods and other property to secure him the money advanced by him? A. I never knew of any arrangement between Mr. Dean and Mr. Crawley Jones.

(138) CROSS-EXAMINATION by Mr. Meredith, Counsel for Claude M. Dean.

1st Q. Mr. Long, you testified on your direct examination that you went up to see old Mr. Jones, the father of R. Crawley Jones. Does he live anywhere near his son? A. I don't know how far he lives from his son.

2nd Q. What was your object in going to see Mr. Jones? A. To get him to take up these notes.

3rd Q. So that you went to see old Mr. Jones for the purpose of getting these notes taken up? A. Yes, sir.

4th Q. Then when Mr. Dean came into the bank to meet Mr. Jones you knew the object for which they were together there? A. I knew that Mr. Jones was coming there, that is, he had told me he was coming there to take up these notes.

5th Q. What arrangement did Mr. Jones tell you that he would make? A. He didn't tell me. He simply said he would take them up. He said he thought he could make arrangements.

6th Q. Now when Mr. Dean got there first, didn't he ask you about Mr. J. Samuel Jones? A. I think he did,
(139) and inquired about Mr. Jones.

7th Q. The fact is that you had been up to Mr. J. Samuel Jones' home for the purpose of having him take up these notes? A. Yes, sir.

8th Q. Was there any reason why you should not have told Mr. Dean about this visit. A. No, sir.

9th Q. When he inquired for Mr. Samuel Jones, didn't you tell him you were expecting him? A. I don't recall. I don't know whether he asked me, and I think it is probable that I told him that I expected him that day. Of course, I can't recall the exact language with reference to our conversation.

10th Q. When you told him, as you think you did, that you expected Mr. Samuel Jones, did you tell Mr. Dean why you expected him? A. I can't say, Mr. Meredith.

11th Q. You can't say because you can't recall? A. I can't recall the conversation. I know that we had a conversation about Mr. Jones coming in the bank that day, but I don't think there was anything said about the place of Mr. R. Crawley Jones, on his plantation, so far as I can recall, because I never have been to his place. I have been to Mr. J. Samuel Jones' farm only once.

(140) 12th Q. And you had just been up there to make arrangements to require the taking up of these notes? A. About two days prior to this time.

13th Q. Was there any reason why you should not have told Mr. Dean this? A. No, sir.

14th Q. When he asked you about the condition of young Jones, didn't you reply that you had been up there? A. Probably I did. I had been to Mr. J. Samuel Jones' place. I don't want to get them confused, that I have been to Mr. R. Crawley Jones'.

15th Q. Probably you did tell him that you had been to J. Samuel Jones? A. Yes, sir.

16th Q. Now, then in that conversation, did you all have any talk about R. Crawley Jones? A. As I stated here before, the conversation was a very brief one and I don't recall any conversation with reference to Mr. R. Crawley Jones.

17th Q. Then you mean to say that Mr. Dean's ac-

count as to the facts recited by him as to the conversation which took place is incorrect? A. I do not undertake to say that. I cannot recall them. I recall that he inquired for Mr. Jones, the old gentleman, and I can't undertake to repeat the conversation.

(141) 18th Q. Then I understand that when Mr. Dean testifies that you stated that the bank and all the holders of these notes wanted cash money you do not undertake to deny that you made this statement? A. I think that it was the fact that they did want the cash.

19th Q. Did you tell Mr. Dean that? A. I can't say that I told him, but I won't say I didn't.

20th Q. You know that the parties did want cash money and you had seen Mr. Samuel Jones about paying the cash money. Mr. Dean says that you told him about taking a deed of trust, and your reason was that the parties wanted cash money? A. I don't recall that conversation with reference to the deed of trust.

21st Q. But you do not undertake to deny positively that you didn't say to Mr. Dean that these people wanted cash money? A. I don't deny positively that Mr. Dean didn't speak of the deed of trust.

22nd Q. Now, do you deny the statements of how you spoke of Crawley Jones' standing in the community prior to this time? A. Yes, sir.

23rd Q. What did you say about R. Crawley Jones (142) at that time? A. I don't recall having said anything about Mr. R. Crawley Jones' character at that time at all. I don't understand why I should have said anything about it because I don't believe I would have said that in the light of current reports at that time.

24th Q. Did those current reports make you feel that in accepting this money for the taking up or payment of these notes you were accepting money from a man who you believed to be insolvent?

Memo: Question and answer objected to on the ground that there is absolutely no evidence that the bank has ever accepted one dollar from R. Crawley Jones.

A. I didn't know at that time that he was insolvent.

25th Q. Would you have taken that money if you had believed him insolvent? A. We took it from the endorser of the note, J. Samuel Jones. That is why we require endorsers.

26th Q. I repeat my question, did you have any idea at the time you took this money that R. Crawley Jones was insolvent, or had any reason to believe that he was insolvent? A. I didn't know whether he was insolvent or not. I had reason to believe that his financial matters were involved.

(143) 27th Q. Did you tell Mr. Dean that his financial matters were involved? A. I don't know whether I told him that or not. I guessed he was cognizant of the fact.

28th Q. Did you tell Mr. Dean that you had reason to believe that Mr. R. Crawley Jones, although not insolvent, was insolvent? A. I don't recall telling him that.

29th Q. What did you say on that point? A. I don't know.

30th Q. Then you won't undertake to say what you did say, will you? A. Not in full.

31st Q. Then when Mr. Dean says that you spoke of this young man as a successful business man and esteemed in the financial and commercial circles of Petersburg, you don't recall whether you said that or not, do you? A. Except, Mr. Meredith, I am not in the habit of undertaking to prevaricate or mislead anyone with regard to another's standing, financially or morally.

32nd Q. Then if you did make that statement it was a deliberate deception? A. It would have been, hearing these rumors as I had at that time.

(144) 33rd Q. Whilst you don't undertake to deny having made this statement, you simply assume that you did not make it because it would have deceived Mr. Dean? A. That is my reason for believing that I didn't make that statement.

RE-DIRECT EXAMINATION by Mr. Bartlett Roper, Jr., Counsel for Complainant.

1st Q. Mr. Long, did your bank ever accept any money from R. Crawley Jones on account of these notes which were taken up on September 3rd, 1909? A. No, sir, we never accepted anything from R. Crawley Jones because, as I stated before, Mr. Jones has never been in the Virginia National Bank since prior to that time, to my knowledge. I have never seen him in there.

2nd Q. Mr. Long, you do deny emphatically, do you not, that you stated to Mr. Claude M. Dean that you had been up to see the place of Mr. R. Crawley Jones and he seemed to have enough to pay everybody he owned? A. Yes, sir, I deny that emphatically, because I have never been to his place.

(145) 3rd Q. Mr. Long, I would like for you to state to the very best of your ability whether or not Claude M. Dean ever asked you as Cashier of the Virginia National Bank why the bank did not take a deed of trust from R. Crawley Jones. A. I do not recall any conversation with Mr. Dean concerning a deed of trust to secure a loan, or any reference whatever to a deed of trust.

4th Q. Mr. Long, you do deny that you told Mr. Claude M. Dean that Mr. R. Crawley Jones had plenty to pay everybody, do you not? A. I do not recall telling him anything of that kind.

5th Q. At the time, Mr. Long, the notes were taken out of the Virginia National Bank by Mr. J. Samuel Jones, which was on September 3rd, 1909, did you have any definite information as to the financial standing of Mr. R. Crawley Jones? I mean by this, did you know anything definite as to the amount of his debts and the amount of his property? A. No, sir, I had no definite information as to his financial standing.

6th Q. Did Mr. J. Samuel Jones in any way give you any definite information as to the standing of his son at the time you visited his farm? A. No, sir, he did not give me any definite information.

(146) 7th Q. Who went with you at the time you visited the farm of Mr. J. Samuel Jones in Brunswick County, Va.? A. Mr. E. A. Abernathy took me from the station over to Mr. Jones' home.

8th Q. At what railroad station did you get off? A. Warfield, on the Seaboard Air Line Railway.

9th Q. Do you know in what county Mr. J. Samuel Jones lives? A. Well, I have learned since that he lived in Brunswick County, but I did not know what county his home was located in at that time.

10th Q. Do you know in what county Mr. R. Crawley Jones lived on September 3rd, 1909, about the time you went to see Mr. J. Samuel Jones? A. No, I don't know whether he lived in Dinwiddie or Brunswick. The county lines are not far apart. I knew his postoffice was Darvills, but I didn't know whether it was Dinwiddie County or Brunswick.

(147) RE-CROSS EXAMINATION by Mr. W. R. Meredith Counsel for Claude M. Dean.

1st Q. Mr. Long, before Mr. Dean came into your bank on that day, did you know that Mr. Dean was coming to your bank? A. I didn't know that he was coming

before he came. Mr. Jones had told me that he would take up the notes.

2nd Q. Did J. Samuel Jones tell you that Mr. Dean was coming?

Memo: Question and answer objected to by counsel for complainant on the ground that the same is hearsay testimony.

A. I don't recall that he told me so.

3rd Q. If he had told you, would you recall it? A. I can't say that I would—three years afterwards.

4th Q. Don't you recall that he not only told you he was coming but that he was coming to help take up those notes? A. No, sir, because he told me he would take them up himself.

5th Q. He didn't tell you then that Mr. Dean was going to help put up the money? A. No, sir.

(148) 6th Q. And he didn't tell you that Mr. Dean was coming over? A. No, sir, not that I recall.

7th Q. Are you certain that? A. I am certain that I don't recall that he told me so.

8th Q. Can't you recall anything? Wouldn't you recall that if it were so? A. I recall having a conversation with Mr. J. Samuel Jones and he told me that he was going to raise the money and bring it to me, but he did not tell me when he was going to raise it or how.

9th Q. Where was that conversation? A. At his home near Warfield.

10th Q. Didn't you see Mr. J. Samuel Jones the day before these notes were taken up? A. I don't recall whether it was the day before or two days before. It was very nearly the same time.

11th Q. When was the next time you saw him after your visit to his home? A. When he took up the notes at the bank.

12th Q. Did you see him the day before he came to the bank to take up the notes? A. I may have seen him the day before, Mr. Meredith, I can't say. I am just try-

(149) ing to recall whether I saw him between the time that I saw him in his home and when he took up the notes. I know he was in the bank that day, but whether he came in between those two intervals or not I can't say.

13th Q. Won't he in the bank the day before the notes were paid? A. I don't recall whether the notes were paid the day after I was at his house or two days subsequent. He may have been in the bank. I can't say

positively whether he was in there prior to the time he paid out the notes.

14th Q. Now, if he was in the bank the day before, why didn't he take up the notes then? A. I don't know, unless he didn't have the money.

15th Q. Didn't he tell you he didn't have the money at that time? A. I don't recall that. He may have done it.

16th Q. Didn't he tell you that he would be in the bank the next day with Mr. Claude M. Dean to take up those notes? A. I don't recall his having made that statement.

17th Q. Didn't he say that Mr. Dean could not raise the money in time to get over that day, but that he would be over the next day with the money, or part of it? A. I (150) don't recall that.

18th Q. Didn't he say that Mr. Dean had requested him to ask you to hold up those notes and any action on them until the next day so that he could come over and assist in paying them? A. I don't recall any conversation between Mr. Jones and myself with referenc to Mr. Dean I remember that we talked about these notes but I do not remember a conversation concerning Mr. Dean. I remember he said to me that he would raise the money. He didn't say where he would raise it or how he would raise it. He said that if I would give him a day or two he would raise the money and take up the notes.

19th Q. Where was he when he told you that? A. Out at his home.

20th Q. He didn't tell you that at your bank? A. I don't recall that he did.

21st Q. Didn't you tell Mr. J. Samuel Jones in your bank the day before these notes were taken up, in reply to a request that you would hold up until the next day until Mr. Dean could come over, that you would hold up and wait until the next day for payment? A. I might (151) have told him that, I don't recall. I might have told him that we would wait another day for the money. If I told him that I told him the next day in my bank between the time I had the conversation with him at his home and the time he paid the money.

22nd Q. Don't you remember telling him that you would wait until the next day for the money when Mr. Dean would come over and take up these notes? A. I don't remember telling him that.

23rd Q. And you don't remember Jones coming in the bank the day before these notes were paid? A. No, I

do not remember, Mr. Meredith. He might have been in there. Don't misunderstand me.

24th Q. If he was in there, wouldn't you remember it? A. There are a great many things that happen that I can't recall, and a great many that I can, because the transaction fixes it on my memory.

25th Q. Let me see if I can't fix your memory. Did Mr. Samuel Jones come in your office at the bank the day before these notes were paid and say that the next day he (152) would be able to take up these notes, but that the party who was coming over would require until the next day to raise the money, that if you would consent to wait until the next day he, Samuel Jones, was to telegraph that party? In reply to that, didn't you consent to wait until the next day and didn't you write the telegram to the party in Richmond who was to come over? A. I certainly do not recall writing any telegram, Mr. Meredith.

26th Q. You won't say you didn't? A. No, I won't say positively I didn't. That could be substantiated one way or the other. The records of the telegraph office will substantiate that statement one way or the other.

27th Q. If you didn't write the telegraph message, was the telegraph message to that party written by J. Samuel Jones in your presence? A. I don't recall.

28th Q. If such a thing had happened, wouldn't you be able to recall it? A. I can't say, Mr. Meredith, because people frequently drop in the office and ask me to (153) write telegrams and fill out notes for them, and I have transactions of that kind every day, all day long, and it is a common occurrence, and I don't undertake to remember them.

29th Q. How many telegrams have you written for other people in the last week. A. I don't know that I have written any. I don't recall having written any in the last week.

RE-RE-DIRECT EXAMINATION by Mr. Bartlett Roper, Jr., Counsel for Complainant.

1st Q. All you have to say about Mr. Samuel Jones visiting your bank after you saw him at his home in Brunswick County, when he told you that he would take up these notes, is that you don't recall whether or not he came to your bank between the date of your visit to him at his farm and the date these notes were taken up. A. Not positive. I do not. I don't deny that or affirm it. I can't recall any conversation with him between the date

of my visit to his home and the day that he took the notes up.

(By agreement of counsel the signature of the witness is waived.)
(154)

DEPOSITION OF DEFENDANT CLAUDE M. DEAN

Filed in Open Court Feb. 15, 1913.

(155)

CLAUDE M. DEAN, a witness of lawful age, being first duly sworn, deposes and says as follows:

1st Q. by Mr. W. R. Meredith: Mr. Dean, will you give your name, age and occupation? A. Claude M. Dean, Deputy Clerk of United States Circuit Court of Appeals, age 38 years.

2nd Q. Are you one of the defendants in this case? A. I am.

3rd Q. Are you the beneficiary under a certain deed of trust dated September 3rd, 1909, from R. Crawley Jones and wife to Edward C. Dean, Sr., Trustee? A. Yes, sir.

4th Q. Did you loan R. Crawley Jones the $1,600.00 mentioned in said deed of trust? A. Yes, sir, in cash.

5th Q. Will you state the circumstances in detail as to how you came to make this loan? A. On September 2nd, 1909, I received from Mr. R. Crawley Jones of Darvills, Va., a letter requesting me to loan him $1,600.00, which letter is as follows:

Darvills, Va., Sept. 1st, 1909.

Dear Claude:

I am in serious trouble and need you help at once badly, being charged with a very grave offense under the law and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600.00 in cash I will be saved, so for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give you notes for the amount, and a deed of trust on everything I have or possess to secure you. All I need is a little time, for I have enough to more than pay you five times
(156) over again. It is absolutely necessary that I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain

further. Find notes enclosed for the amount and as soon as you prepare deed of trust I will sign same.

Sincerely yours,

R. C. JONES.

This letter was brought to me by J. Samuel Jones, the father of R. Crawley Jones.

6th Q. State what conversation you had with Mr. J. Samuel Jones, especially as to the ability or inability of R. Crawley Jones to re-pay you this sum? A. I asked Mr. J. Samuel Jones of the financial condition and solvency of his son and he stated to me that he considered it very good and in fact so good that he himself had loaned his son $500.00, for which he did not request, nor would be request any security therefor. He said also that his son was doing a very good business, both in carrying on a store and farming. That he had a very large farm on which there was a corn crop which he thought would bring between five and six hundred dollars and a tobacco crop which was worth about three or four hundred dollars. That he was at this time building a new dwelling house on the farm by day labor and that this had taken a great deal of cash money.

7th Q. Who was building? A. That R. Crawley Jones was building a new dwelling on his farm. That he himself would have loaned him more money but at that time he had not sold his own tobacco crop and was therefore unable to do so. That he had a very large stock (157) of goods in his store.

8th Q. Who? A. That R. Crawley Jones had a very large stock of goods in his store on which he thought there was very little due. He stated that his son desired to meet some obligations at the bank on which there was certain endorsements which were questioned and therefore he needed some ready cash to pay the same so that he would be relieved of any embarrassment and he would then be able to carry on his farming and business and would be able to return the money to me.

9th Q. Did you have any reason to doubt these statements of J. Samuel Jones? A. No, I did not. On the contrary I had implicit confidence in him and believed the statements to be true.

10th Q. Did you know what was his general reputation in the community at the time these statements were made to you by J. Samuel Jones and what his general reputation in the community now is for truth and veracity? A. I had known Mr. J. Samuel Jones previous to

this time about three or four years and I always understood that he stood very high in his community, both as to character, veracity and integrity and I am still of the same opinion as to his reputation, character and veracity.

11th Q. What was R. Crawley Jones' reputation at the time you received his letter for truth and veracity? A. Very good. I had never known of a case where either was questioned.

12th Q. And what as to his integrity? A. He was an unusually bright youn*d* man and industrious and a very steady man at his business and attention to his home life.

13th Q. He is a connection of yours by marriage is (158) he not? A. He is a brother-in-law, having married my sister.

14th Q. Did you at the time of the receiving of this letter from R. Crawley Jones have any knowledge of his business and his financial condition and if so what knowledge? A. As a brother-in-law I naturally learned at various times about his success in business, both as a saleman and merchant and a farmer. I learned that he had a very valuable farm and that he was doing a very good business.

15th Q. Have you narrated all of the conversation you had with Mr. J. Samuel Jones in the interview mentioned? A. As far as I can remember at this moment I have.

16th Q. After he had told you about his son's financial condition, what, if anything, did you promise to do? A. I told him that I did not have that much money at that time but it was more than likely that I could secure the same the next day. He then stated to me that it was very important that this money be secured as soon as possible. That because of the threatening proceedings against his son, the money would have to be arranged for at once. I then told him it would be impossible for me to secure the money until the next day and to return and tell his son that I would arrange to secure the money the next day, and on his way home to stop by the bank in Petersburg and see if the notes were paid the next day if that would be in time, and if so, to wire me and I would meet him in Petersburg the next day. I did receive a telegram from him to meet him in Petersburg the next day.

17th Q. What did you do concerning the receipt of that telegram. On the following morning September 3rd I went to Petersburg to enquire as to Mr. Jones trouble and also as to his credit, finances and solvency and be-

(159) lieving the best place to obtain this information would be from the bank, I called on the Cashier of the Virginia National Bank, whose name I did not know at that time but I have since learned was Mr. John W. Long, who has already testified in this case. The cashier of that bank stated to me that so far as he was informed, the question about the endorsements not being genuine was merely a rumor, and that he had so informed one of the reporters of one of the newspapers published in Petersburg, and advised him not to make any publication as it might get the paper in trouble. I then asked the cashier as to Mr. R. Crawley Jones' standing in Petersburg and he stated to me that he stood as well as any young man in that community and that the merchants in Petersburg had a great deal of confidence in him and that this was well shown by the unlimited credit they had given to him when he first started in business with a small capital. I then asked the cashier how Mr. R. Crawley Jones stood financially and he stated to me that he had been up there and seen the place and investigated, and it was his opinion that he had plenty to pay everybody. I also asked the cashier why did the bank not take a deed of trust, and he stated to me that the parties for whom they were collecting the notes wanted cash money.

18th Q. Mr. Dean, have you the slightest doubt in your mind as to the accuracy of the foregoing conversation with Mr. Long? A. I have not the slightest doubt whatever. I am positive of this conversation and that Mr. Long stated to me as I have above testified to.

19th Q. State whether or not your financial condition was such that you could afford to loan this money without any chance of its repayment. A. My main object in calling on the cashier of the bank was to learn of the (160) financial condition of Mr. R. Crawley Jones and how he stood in that city and as much as I would have liked to accommodate him I would not have loaned him the money but for this information that I had received from the cashier of the bank, as I did not have that amount of money myself and in order to make the loan it was necessary for me to borrow the money, and I would not have borrowed the money to lend R. Crawley Jones except upon good security and if I had thought for one moment that I was not receiving good security I would not have made the loan. But from the information I had received from the cashier of the bank and his father and the contents of R. Crawley Jones' letter to me dated September 1st, 1909, I was thoroughly convinced that he was

in good financial condition, and only needed some ready cash money to tide him over this threatened embarrassment and with this loan he would then be able to carry on his business and farming without being embarrassed in any way.

20th Q. State whether or not some of the chief creditors of R. Crawley Jones were directors in the Virginia National Bank of Petersburg at the time Mr. Long, its cashier, told you that he had seen R. Crawley Jones' place and store and that he had enough to pay everybody?

Memo.—Counsel for complainant objects to the foregoing question and any answer thereto for the reason that if some of the creditors of R. Crawley Jones were directors in the Virginia National Bank, it nowhere appears in the records in this case that they had any knowledge whatsoever of any settlement had by John W. Long, as cashier of said bank, even before or after said settlement had taken place.

To which objection the counsel for Claude M. Dean (161) replies that it is for the very purpose of showing that these creditors did know of this settlement and payment of these notes. That he wishes to show that these same creditors were directors in this Virginia National Bank for which Mr. Long spoke when he had the above conversation with Mr. Dean.

A. During my conversation with the cashier of the bank he stated to me that this matter as to the signatures of one of the endorsers on the notes not being genuine had not been mentioned outside of the bank and that no one knew about it except he and the Board of Directors of the bank, who had talked the matter over. The following creditors of R. Crawley Jones with the amount of his indebtedness to each of them who were members of the Board of Directors of the said Virginia National Bank are as follows:

Chas. Lunsford, of Chas. Lunsford & Co., amount of claim $10.77.

J. E. Young, of the Virginia Dry Goods Co., Inc., amount of claim $362.15.

G. C. Wright, of Aug. Wright Co., amount of claim $542.85.

Bartlett Roper, of Roper & Co., Inc., amount of claim $234.77.

W. W. Warren, of C. C. Alley, Inc., amount of claim $64.16.

21st Q. Did you make any inquiry as to whether Mr. R. Crawley Jones owed anything on his stock of goods at Darvills, on which you took the deed of trust. A. I asked his father, J. Samuel Jones, as to this, and he stated to me that he thought he owed very little.

22nd Q. Some complaint is made that you did not examine the books of R. Crawley Jones before you made the loan, meaning the books he kept in the store; did you take the opportunity to do this? A. I did not examine the books of R. Crawley Jones for several reasons. First, he was threatened with this criminal proceedings and the (162) loan had to be made at once in order to prevent the criminal proceedings, and I was unable to see him as I said, because of this threatening criminal proceeding; and, second, not being a bookkeeper or an accountant I would not have been able to have learned very much, if anything, of his business affairs through a personal examination of his books; and, third, I did not deem it necessary because of the very frank information I had obtained from the cashier of the bank and also from his father as to his financial condition, standing in the estimation of and credit with the merchants in the City of Petersburg, and I sought this source to obtain the information because I had always understood that you can learn more of a man's financial standing through the bank he does business with than in any other way. However, when I went to Mr. Jones' country place to get him to sign the deed of trust, which he had agreed to give me in his letter to me, above referred to, he took me all over his farm and in his store and also into his house. He said to me that his corn crop would bring between five and six hundred dollars and that it would make about one hundred bushels and that his tobacco crop would bring between three and four hundred dollars, and that his farm was considered to be a very valuable farm and was worth between $4,500.00 and $5,000.00. In going over the farm my attention was also called to his pea crop and to his live stock. His house was well furnished and from all appearances he seemed to be in a most prosperous condition, and after being shown all these things I was then convinced of the truthfulness of the statements in his letter and also the statements made to me by the cashier of the bank and his father.

23rd Q. You say that Mr. Jones told you that his (163) farm was worth $4,500.00 to $5,000.00? A. Yes, sir.

24th Q. Did he tell you he had a mortgage on it of

$3,000.00? A. When I went up to Mr. Jones' place I was of the opinion that the farm had been paid for, but Mr. Jones informed me at the time we were filling out the deed of trust, that he had a deed of trust on the farm for, according to my recollections, for $3,000.00.

25th Q. Who else corroborated to you Mr. Jones' statement that that farm was worth something like $5,000.00? A. Several days after the deed of trust was given to me and was recorded, a committee of the creditors of Mr. Jones called on me and after the meeting of the creditors broke up, Mr. Cleveland Wright, who was one of Mr. Jones' creditors and a member of the committee who called on me, stated to me that he believed that that farm was worth about $5,000.00 and it was his intention when the same was offered for sale, to attend the sale and buy it at a reasonable figure, for he knew the value of it, and in this way, if he did not get the money due him by Mr. R. Crawley Jones, he would be able to make it out of a re-sale of the farm and that he had done this on one or two occasions and thereby saved himself any loss.

Memo.—The foregoing answer objected to by counsel for the complainant on the grounds that the same is heresay testimony and is irrelevant and immaterial.

26th Q. With all these facts, as narrated by you, before you at the time you made this loan, will you please state whether or not there was any reasonable grounds for you to believe that R. Crawley Jones was insolvent at the time you made the loan? A. No, there were no rea-
(164) sonable grounds for me to believe that Mr. Jones was insolvent at the time, but on the contrary I believed him to be perfectly solvent and that he only needed some ready cash to tide him over this embarrassment, and he would then go ahead and continue his business and conduct his farm in the usual way. I might say here that at the time Mr. Jones stated to me that there was a deed of trust on his farm that the same was given to secure long term notes, according to my recollection, three, four and five years, and that he would only have to pay thereon up to the maturity of the first note the annual interest.

27th Q. What time on the 3rd of September did you have your conversation with Mr. Long, the cashier? A. I had two conversations with Mr. Long, the cashier, one between the hours of 12 and 1 and the other after 4 o'clock.

28th Q. How did you raise this money, the $1,600.00? A. I borrowed the money on my personal note.

29th Q. Where? A. From an aunt of mine.

30th Q. Are you still carrying it? A. I have paid off the original note, but in order to do so I had to borrow from another source and still owe the money.

31st Q. Did the father of R. Crawley Jones meet you in Petersburg? A. He did.

32nd Q. What did you do then? A. He stated to me that his son, R. Crawley Jones, had directed him to get the money that I had agreed to loan and had given him directions as to the use of the same. He then stated to me that if I had the time that he would be glad if I would go with him to pay the money as directed by his son which I did. He first went by a bank in Petersburg and paid that bank three or four hundred dollars and then we went (165) to the Virginia National Bank, of which Mr. J. W. Long is the cashier, and Mr. J. Samuel Jones paid the notes held by the bank of which Mr. Long is the cashier, amounting to between $1,900.00 and $2,000.00, using the $1,600.00 that I loaned, together with some money he, J. Samuel Jones, had loaned his son to do so.

33rd Q. And I understand, the net result of the transaction was that with the aid of your $1,600.00 something like $2,300.00 of R. Crawley Jones' debts were paid, for which no security was taken except your $1,600.00? A. Yes, sir.

34th Q. Why did you not take the deed of trust on September 3rd, the day you loaned the money? A. I was unable to see Mr. R. Crawley Jones on that day, because as I have already stated before, he was threatened with this criminal proceeding, and therefore, was unable to see him, however, I asked his father to tell his son to come to Richmond the next day and sign the deed of trust to secure the notes he had sent me in his letter, dated September 1st, 1909, amounting to $1,600.00, to which J, Samuel Jones replied that if the next day was a clear day, it would be best for his son not to come to Richmond on that day but to remain at home and cut his tobacco, for if this was neglected the tobacco would likely be ruined. On the following Thursday or Friday, I went up to Mr. Crawley Jones' home at Darvills to get him to sign the deed of trust I prepared in blank on my return to Richmond the day I loaned the money. Upon my arrival, as I stated before, I was shown over the farm, etc., and then we filled the blanks, naming the various articles, etc., and he and his wife signed the same. Learning that a Mr. W. P.

Wells, a Notary Public, would take the acknowledgment, his name was written in the blank left in the acknowledg-
(166) ment for that purpose, that being the only blank space left in the acknowledgment. Having prepared the deed in blank on September 3rd, 1909, this date was also stated in the acknowledgment and through an inadvertence on my part the date in the acknowledgment was not changed. However, several days thereafter my attention was called to this inadvertence and I immediately wrote Mr. Wells, the Notary, that it was an inadvertence on my part in not changing the date of the acknowledgment from September 3rd, 1909, the date the deed of trust was prepared by me and I would so state if any question ever arose about the same.

35th Q. Mr. Dean, you loaned only the sum of $1,600.00, but you took a deed of trust on a very large amount, if not all of the property of R. Crawley Jones, please state why you made the deed of trust cover all this property? A. After Mr. Jones had shown me all over his property and just before we began filling in the blanks in the deed of trust, he asked me if I wanted the deed to cover all these things and I stated to him that while I did not think it was at all necessary, nevertheless, I thought it best to carry out the contents of his letter as contemplated therein, and especially in view of the fact that if it became necessary to sell under the deed of trust that everything over and above $1,600.00 would revert back to him.

36th Q. When you say that you wished and thought it proper that the deed should conform to the letter, you mean the language in his letter dated September 1st, 1909, which is as follows : "If you will do this I will give you notes for the amount and a deed of trust on everything I have or possess to secure you." A. I do.
(167) 37th Q. How were the notes, inclosed in this letter, subdivided? A. The notes were payable 7, 30, 60 and 90 days after date, respectively, and were for $100.00, $500.00, $500.00 and $500.00, respectively, and all the notes were dated September 1st, 1909.

38th Q. Did you know then that the first of these notes was due the day he gave you the deed of trust? A. The 7 day note would have been due the day the deed of trust was given, but this first note was extended 3 days and this extension was written on the face of the note.

39th Q. Why was this done? A. This was done because Mr. Jones stated that he expected to collect some

accounts and would pay the same therefrom in the next day or so.

40th Q. Did he do this? A. This note with the 3 days extension fell due on Saturday following the giving of the deed of trust and the same not having been paid, I directed the trustee named in the deed of trust to take charge and dispose of the property in according with the terms and conditions of the deed of trust.

41st Q. When did the trustee take charge of the property under the deed of trust? A. The following Monday, September 13th, Sunday intervening.

42nd Q. Why did you have your father made the trustee in this deed of trust? A. Not knowing anyone in that locality and not dreaming for a moment that the deed of trust would ever have to be foreclosed, I named him.

43rd Q. Has the money due you under this deed of (168) trust ever been paid by Mr. R. Crawley Jones or any part thereof? A. No, it has not.

44th Q. What became of the property conveyed under the deed of trust? A. Several days after the trustee took charge of the property named in the deed of trust a committee representing the Petersburg creditors of Crawley Jones called to see me to discuss the affairs of Mr. R. Crawley Jones. At the meeting Mr. Crawley Jones stated that he was perfectly solvent and if he was permitted to continue his business without any embarrassment or interference on the part of the creditors, there would be no doubt of his being able to pay more than he owed. This was about the 17th of September, 1909. I stated to the committee that it was my desire to assist them in every way I could consistently do so and to assure them of my sincerity in this, and in order for them to be sure that the sale under the deed of trust would be carried out according to the terms thereof and at the suggestion of counsel for the committee I agreed to allow them to name a proper person to be substituted under my deed of trust and they suggested the name of a Mr. W. P. Wells of that locality, and afterwards, with my written consent, counsel for the creditors had the Circuit Court of Dinwiddie County substitute Mr. W. P. Wells under the deed of trust given me under the deed of trust. Mr. Jones stated to the committee that the larger portion of his indebtedness was represented by long term notes, and I remember especially the two notes given to R. E. Blakey amounting to $2,250.00 were payable one and two years after February 20th, 1909, respectively.

The farm property and the amount due thereon was also discussed at the meeting. I stated to this committee that it was my opinion that if Mr. Jones was permitted to con-
(169) tinue and carry on his business and farming in the usual course that there would be no doubt about his being able to pay everybody. It was also agreed between me and counsel representing the committee, who was present at that time, that in disposing of the property and the articles named in the deed of trust, that the trustee would not sell the household goods until the last, because we all thought at that time it might not be necessary to sell them and did not wish to sell Mr. Jones household furniture unless it was absolutely necessary.

Memo.—The above answer objected to by counsel for complainant on the grounds that the same is hearsay testimony for it nowhere appears that R. Beale Davis, Jr., trustee, the complainant in this case, was ever present at said meeting or had any part therein.

The counsel for Mr. Dean replies that the trustee in this case is the mere agent of the creditors and stands in their shoes and is appointed by them.

45th Q. You stated to this committee of creditors on the 17th of September that in your opinion R. Crawley Jones was on that day and at the time you took your deed of trust solvent, and it seems from the testimony in this case that the proven debts amount to $5,394.08. Will you please state all the facts you based your belief in R. Crawley Jones' solvency taking these proven debts as the amount of his liabilities. A. First, the proven debt of Mr. R. E. Blakey is for $2,250.00 given by R. Crawley Jones for the purchase of the old stock of goods in the store and farming implements, etc., on the farm at Darvills. This claim is represented by two notes, both dated February 20th, 1909, and are payable 1 and 2 years after
(170) date, respectively. Deducting this claim because of the fact that it was not due at that time and no part of it would be due until February 20th, 1910, would cut down Mr. Jones' proven debts from $5.394.08 to $3,144.08, and Mr. W. P. Wells, the substituted trustee in the deed of trust, has testified in this proceeding that it was his opinion that if Crawley Jones had been permitted to dispose of his stock of goods in the usual business way, the stock of goods would have brought about $3,000.00 . Mr. Wells has also testified in this proceeding that the trustees' expenses in foreclosing my deed of trust amounted to about

$500.00, which could have been applied to the payment of Mr. R. Crawley Jones' debt. Mr. James M. Quicke, the trustee under the deed of trust given by R. Crawley Jones and wife for the purchase of the farm, has testified that the expenses of that sale amounted to about $500.00, and this $500.00 could have also been applied to the payment of Mr. Jones' debts, and if Mr. R. Crawley Jones had been permitted to cut and dispose of his corn crop and tobacco crop in the usual business like way together with his pea crop, these three would have brought at least a $1,000.00, whereas the trustee only received a very small amount therefor, because the same were not given the attention they required. If the farm had not been sold under the deed of trust, which sale was brought about by the bankruptcy proceeding of the said R. Crawley Jones, it would have easily brought between $4,500.00 and $5,000.00, and this amount might have also been used in the payment of Mr. Jones' debts. Mr. Jones also had household furniture worth between $800.00 and $1,000.00, which could have also been disposed of in the payment of (171) his debts. There were also some articles which were named in the deed of trust which were not disposed of by the trustee, but were turned back by W. P. Wells, the trustee, to R. Crawley Jones, the trustee having disposed of only a sufficient amount to pay for the notes secured by the deed of trust, namely, $1,600.00 and his expenses.

Memo.—Counsel for the complainant objects to the foregoing question and answer on the grounds that the witness has attempted to express an opinion as to the value of goods, which from his own testimony he has little or no knowledge, the witness having previously stated that the first visit he made to the home of R. Crawley Jones in Dinwiddie County, was made on September 9th, 1909, and it nowhere appears that he ever went there again. Counsel for the complainant object to the foregoing question and answer for the further reason that all question as to the solvency or insolvency of R. Crawley Jones has been passed on in the bankruptcy proceedings, instituted in the United States District Court, Eastern District of Virginia, styled Aug. Wright Co., and Others vs. R. Crawley Jones, and the question of solvency or insolvency is now *res adjudicata*. The question and answer objected on the third grounds that a large part of the answer, if not all of it, is irrelevant testimony to the matter at issue in this cause.

46th Q. In view of the foregoing statement of counsel, Mr. Dean, will you please state the date on which Mr. R. Crawley Jones was adjudged a bankrupt? A. April 25th, 1910.

47th Q. Was he adjudged a bankrupt in voluntary or involuntary proceedings? A. He was adjudged a bankrupt in involuntary proceedings, brought by Aug. Wright Co., and other creditors, viz., Petersburg Dry Goods Co., Virginia Dry Goods Co., Inc., and Chas. C. Alley, Inc. Officers of all the foregoing petitioning creditors were di-
(172) rectors of the Virginia National Bank except the Petersburg Dry Goods Company.

48th Q. When was the creditors' petition filed? A. The petition was filed December 24th, 1909.

49th Q. I notice that the next to the last paragraph of said petition is as follows:

"Your petitioners are not advised that the said banks knew or had reason to believe, at the time the notes were paid, as aforesaid, that the said R. Crawley Jones was insolvent."

Did you have a greater reason to believe in his solvency than did all these banks or their directors? A. I did not; as a matter of fact, I received most of my information as to Mr. Jones' financial condition and solvency through the cashier of said bank.

50th Q. In Mr. Wells' testimony in the involuntary proceedings in bankruptcy of R. Crawley Jones, he states as follows: "Q. About how much property did you turn back to Mr. Jones? A. I turned the accounts; I think somewhere near five hundred dollars.

Q. What else did you turn back? A. Some household furniture."

Is this a fact? A. As far as I know. I only know this to be a fact from what Mr. Wells has testified to in that proceeding and in this proceeding.

Memo.—Answer and question objected to by counsel for complainant on the grounds that this is hearsay testimony.

51st Q. Mr. Dean, it was stated in these bankruptcy proceedings that you purchased these notes from the bank, did you do so? A. I did not. The notes held by the bank for collection were paid and not purchased.
(173) The notes paid at the first bank Mr. J. Samuel Jones and myself went to were stamped paid, but those paid at the bank of which Mr. Long was the cashier were

not marked paid. The reason why they were not marked paid at that time I inferred that it was because it was after banking hours, and the transaction being in the office of the ca[illegible], the paid stamp not being convenient, it was not used, but nothing was said about this, however. I personally afterwards marked the notes paid.

52nd Q. How many of these notes were past due and how many were not due? A. At the time that I consulted with Mr. Long, the cashier, whilst it was not stated directly, I had been led to believe that they were all due on that date.

Cross Examination.

By Mr. Bartlett Roper, Jr., Attorney for Complainant:

1st Q. You stated that you borrowed the money from your aunt that you loaned to R. Crawley Jones; where was your aunt living when you borrowed this money? A. Petersburg, Virginia.

2nd Q. What is the name of your aunt? A. Mrs. J. D. Bowie.

3rd Q. When did you first find out, Mr. Dean, about this deed that Mr. R. E. Blakey had on the farm of Mr. R. Crawley Jones near Darvills? A. When I went up to Mr. Jones' place to get him to sign the deed of trust. This was about the 8th or 9th of September, 1909.

4th Q. Then up to that time you had no knowledge that there was a deed of trust upon this farm? A. Up to that time, no.

(174) 5th Q. If you thought R. Crawley Jones perfectly solvent and in such a prosperous condition as you have described, why did you require of him a deed of trust on practically everything he owned, his stock of goods and fixtures, household and kitchen furniture, growing crops, store accounts, farm utensils and live stock, and in that way publish to the world the unfortunate position in which your brother-in-law had placed himself? Did you think the creditors would remain idle and take no steps to collect at least a part of their claims? A. As I stated in my examination in chief, Mr. Jones asked me the question if I wanted everything to go into the deed. I stated to him that I did not think it was at all necessary, but in order to carry out the agreement in his letter of September 1st, 1909, I thought it was best to put everything in as set out or contemplated in his letter, as it would make very little dfference, for if it ever became necessary to have a foreclosure sale under the deed

of trust everything would revert back to him after a sufficient amount had been sold to pay the $1,600.00. Believing Mr. Jones to be solvent and in good financial condition, I did not fear or hesitate in having the deed recorded and, thereby, informing, as you say, all his creditors of the giving of the same and the world, as I was fully convinced from the information I received from the cashier of the bank and from Crawley Jones' father, that he was perfectly solvent.

6th Q. If you thought R. Crawley Jones solvent and in such a prosperous condition as you have described, why did you the very next day after the deed of trust had been executed and the same day that the deed of trust was admitted to record, request the trustee, E. C. Dean, (175) to take charge of the property and dispose of the same according to the terms and provisions of this deed of trust? Why should you have been in such a hurry to have the property mentioned in the deed of trust sold? A. Having borrowed the money in order to make the loan and this being a business transaction, I did like I would have done in any other business transaction; therefore, when the terms and conditions of the deed of trust were not fulfilled, I felt it my duty to direct the trustee to take charge of the said property named in the deed of trust and in accordance with the terms and conditions thereof.

7th Q. Did not Mr. R. Crawley Jones on September 9th, 1909, when he and his wife executed the deed of trust to E. C. Dean, trustee, demur giving you a deed of trust on the stock of merchandise at his store-house at or near Darvills, and did you not demand of him that he do so? In order that I may comply with the law, I wish to state that I expect to prove that he did. A. Mr. Crawley Jones gave me a deed of trust on the things named in the deed of trust in accordance with the agreement to do so in his letter to me of September 1st, 1909, and unless you construe his asking me if I wanted everything to go into the deed, and my answer thereto that in order to carry out the agreement of his letter everything should go in, then my answer would be that he did not demur.

8th Q. How did you find that the note was not paid on the 11th of September? I have reference to the first note secured by the deed of trust of September 3rd, 1909. A. My recollection as to this is that he was either to pay this $100.00 to my father for me or send or bring it to (176) Richmond on that day. I did not put the notes in bank at that time for collection, because they were payable in Petersburg and I lived in Richmond.

9th Q. Before making the loan of $1,600.00 did you ever ask R. Crawley Jones anything as to the amount he owed on his stock of merchandise at his store-house at Darvills? A. I did not ask Crawley Jones anything as to the articles you mentioned before the loan; as I said before, he was threatened with these criminal proceedings and I was unable to see him.

10th Q. Before making the loan did you examine the books of R. Crawley Jones to find out the amount of his outstanding indebtedness for merchandise purchased and used in his store at Darvills? A. No, I did not, for the reasons stated in my foregoing answer, because of the fact that he was threatened with these criminal proceedings and I was unable to see him, and not being a bookkeeper or an accountant, I do not know that I could have secured any better information examining his books than I had obtained from his father and the cashier of the bank, Mr. Long.

11th Q. Did you ever request of J. Samuel Jones, the father of R. Crawley Jones, a statement in writing showing the amount of his son's assets and liabilities? A. I did not request Mr. J. Samuel Jones to give me a statement in writing as to Mr. Crawley Jones' assets and liabilities, but did have him, as stated before, give me the information, as stated before, as to his financial condition.

12th Q. You looked upon Mr. J. Samuel Jones then as a very upright, straightforward and honest man, in whose veracity you had implicit confidence? A. I did.
(177) 13th Q. And you still have that confidence in Mr. J. Samuel Jones? A. I have no reason to change my opinion.

14th Q. In your testimony before the United States District Court, in the bankruptcy proceedings of Aug. Wright Company and Others vs. R. Crawley Jones (page 42 of the printed record of appeal to the United States Circuit Court of Appeals) referring to the visit made you by J. Samuel Jones on September 2nd, 1909, when he brought you the letter from his son R. Crawley Jones, asking for the loan of $1,600.00, you stated in answer to a question asked you by me that J. Samuel Jones told you that his son owned, besides certain personal property mentioned in your answer "a farm on which there was a mortgage," how do you reconcile the above statement made by you that you did not know about the deed of trust from R. Crawley Jones to James M. Quicke, Jr., trustee, until you were filling in the blanks in the deed of

trust on September 10th, 1909, eight days after said visit to you, at the home of the said R. Crawley Jones in Dinwiddie County? A. My answer to this is that there must be a mistake of the stenographer who reported this case in leaving out some word, or that it was due to my desire to give the court all the infomation that I possessed and in doing so I wished to point out the particular farm which Mr. Jones was speaking of and in that way I stated on which there was a mortgage. Of course, at the time that this testimony was given by me in April, 1910, I then knew that there was a mortgage. It is certainly not my recollection of the conversation between J. Samuel Jones (178) and myself that he told me that there was a mortgage on the farm.

15th Q. Mr Dean, about how many times have you read that testimony from that printed record? I have reference to your testimony before the District Court in the case of adjudicating R. Crawley Jones a bankrupt. Why is it that you did not call someone's attention to it if the stenographer had taken it down incorrectly? A. Whilst I have read some parts of the record over in the case you mention, several times, a great deal of time has elapsed since the giving of that testimony and the hearing of the case of R. Crawley Jones, Appellant, vs. Aug. Wright Co., et al., which was appealed to the Circuit Court of Appeals, I cannot say that I have read some parts of the record over possibly more than once or twice during the last year.

16th Q. Who took charge of the notes that were taken up at the Virginia National Bank on September 3rd, 1909? A. Upon the payment of the notes by J. Samuel Jones, the cashier of the bank handed the same, that is the notes that were paid, to J. Samuel Jones and J. Samuel Jones afterwards handed the same to me, saying that his son had so directed him, and my recollection is that I was to keep the same until I saw R. Crawley Jones and then turn them over to him, which I afterwards did.

17th Q. Were you present when the cashier turned these notes over to J. Samuel Jones? A. I was present at the time when Mr. J. Samuel Jones paid the notes and the cashier turned them over to him.

18th Q. Have you still got the notes, and if not, who has them? I mean the notes taken up at the Virginia National bank on September 3rd, 1909? A. As I stated in my previous answer, I turned them over to R. Crawley (179) Jones.

19th Q. When did you turn them over to R. Crawley Jones? A. I don't remember the exact date now, but during one of Mr. Jones' visits to Richmond.

20th Q. About how long after they were taken up? A. I am unable to say with any exactness just when it was.

21st Q. Did you not refuse to turn them over to R. Crawley Jones? A. No, I did not.

22nd Q. You never refused to turn these notes over to R. Crawley Jones. A. I did not.

23rd Q. Did you keep them as long as three months? A. I cannot say just how long. It was sometime afterwards, but this matter having arisen in 1909, I cannot recall just now when it was when I turned them over to him. If you can suggest anything which will freshen my mind, I will be glad to answer your question more definitely.

24th Q. Did not Mr. R. Crawley Jones threaten to sue you for the recovery of these notes? A. I have no recollection whatever of any such threat.

25th Q. Do you state that he did not. A. I state that Mr. Jones has never threatened to sue me if I did not turn over these notes to him, so far as I remember.

26th Q. In order that you may refresh your memory, I hand you a letter which I shall ask the Commissioner to mark C. M. D. No. 1, in handwriting of R. Crawley Jones, dated May 4th, 1910, to Mr. W. P. Wells, Wellville, Virginia, which I will thank you to read and then state whether or not Mr. R. Crawley Jones ever threatened you with suit for the recovery of these notes, taken up by you at the Virginia National Bank on September 3rd, 1909?

Memo.—The foregoing question and letter objected
(180) to by counsel for Claude M. Dean as *res inter alios acta.*

A. In answer to your question, I state that the notes referred to in said letter are not the notes paid at the bank, but are the four notes given by R. Crawley Jones to me and are those secured by the deed of trust. After the trustee had sold sufficient property to pay these four notes, namely, $1,600.00 and his expenses, Mr. Jones then requested that the trustee pay the notes secured by his deed of trust dated September 3rd, 1909, and turn the same over to him. This the substituted trustee under the deed of trust of September 3rd, 1909, Mr. Wells, was

unable to do because I, the beneficiary under the deed, had agreed with counsel representing the Petersburg creditors, to allow Mr. Wells, the Trustee, to hold the money received from the sale of the things mentioned in the deed of trust until counsel for the creditors had had an opportunity to test the validity of my deed of trust, which they afterwards decided to do, and, of course, I was unwilling to turn the notes held by me over to the trustee until I had received the money from the trustee in payment of same, and therefore, the trustee under the circumstances refused to comply with Mr. Jones' request, and no doubt so explained the matter to him to his satisfaction as no such action was ever taken by him. So you see he threatened to sue the trustee and not me.

27th Q. Who withdrew from the Clerk's Office of Dinwiddie County the deed of trust of September 3rd, 1909, executed by R. Crawley Jones and wife? A. At my request the Clerk of that Court mailed the deed of trust to me and I received the same.

28th Q. Have you the deed of trust in your possession and will you produce same and mark the same C. M. D. No. 2 and file with the Commissioner? A. Owing to the fact that my offices have recently been removed from the old Post Office Building at 7th and Franklin (181) streets in this City into the new Post Office Building at 10th and Main streets of this City, and all of my papers having been placed in boxes and other receptacles and I have been unable to assort the same and place them in their respective places, where I usually keep such papers, I am unable to put my hands on it at the present time, but I shall make a search therefor, if you desire, and if I find the same, which at present I do not contemplate I will have any trouble of doing, I will be glad to file the same as an exhibit in these proceedings.

29th Q. When you prepared that deed of trust of September 3rd, which you said you prepared on September 3rd, on your return to Richmond from Petersburg, was the same written on the typewriter or was it in your hand writing? A. My recollection is that it was in my hand writing and that the beginning and closing was possibly on form paper, or it might be that I copied from the form on legal cap paper, but I am pretty certain that it was in my hand writing.

30th Q. You prepared this deed of trust on September 3*th*, 1909. You knew on that day that the deed of trust would not be executed on September 3rd, why did you fill the date (September 3rd) in the Notary acknowl-

edgment? A. In filling up the form I was either writing on or following, I filled in all the blanks I could, and as soon as I learned that at Mr. Jones' house Mr. Wells was to take the acknowledgment, I then filled in his name in the blank left for that purpose.

31st Q. You have stated, Mr. Dean, that you thought Mr. R. Crawley Jones would be able to continue his business after giving the deed of trust of September 3rd. How could you possibly believe that R. Crawley Jones would be able to continue his business after he had given you a deed of trust on practically all of his property, and you had instructed the trustee on the very next day after the deed had been excuted to take charge (182) of the property covered thereby? Don't you know that the giving of the deed of trust on his entire stock of goods and fixtures would destroy his credit as soon as the fact became known. Then how could he possible hope to continue his business? A. Believing Mr. Jones to be solvent from the information that I had obtained from the cashier of the bank and his father, and after seeing his farm, crops, store, house and household furniture, I did not see why the giving of a deed of trust would destroy his credit. Anyone reading the deed of trust would readily see that the amount secured thereby was only $1,600.00, and that although the deed covered a great many things, yet it would not take all of those things to satisfy the payment of $1,600.00.

32nd Q. Did not the deed of trust tie up his entire property so that he could not use one cent thereof to pay any debts he might owe until you were paid your $1,600.00. A. No, I do not think that it did. There was only $100.00 due within the next few days of the giving of the deed of trust, and then only $500.00, 30, 60 and 90 days, respectively. Mr. Jones as late as November 16th, 1909, was furnishing his creditors with a statement of his indebtedness, and had shown the same to a Mr. Thomas of the Virginia Dry Goods Company, one of Mr. Jones' largest mercantile creditors, on November 16th, 1910, which seemed to satisfy him.

33rd Q. Then I understand from your answer that if Mr. R. Crawley Jones had paid his first note for $100.00 he could have then gone on and sold the stock of goods and other property named in your deed of trust, taken the money and paid it over to his creditors, and you would not have objected? A. Mr. Jones had a perfect right to do what he pleased with this property

provided he kept within the terms of the deed of trust, (183) given to me and dated September 3rd, 1909.

34th Q. I hand you a paper purporting to be a memorandum of the agreement between yourself and myself as attorney for certain creditors. The paper is dated September 18th, 1909. Please examine this paper and state whether or not you signed same? A. I did.

The paper is herewith handed the Commissioner with the request that he file the same marking it C. M. D. No. 2.

35th Q. Do you know, Mr. Dean, the amount at which the farm in Dinwiddie containing 201 acres, owned by R. Crawley Jones, was assessed for taxation on the land books of said County for the year 1910? A. I do not.

36th Q. Please examine the letter which I now hand you addressed to Mr. John T. Hargrave, Deputy Clerk, Dinwiddie Courthouse, Va., dated October 18th, 1912, and state at what amount this farm is assessed for taxation on the land books of said county, for the year 1910. A. It is written at the foot of a letterhead of Roper & Davis, Attorneys at Law, Petersburg, Va., as follows: "Dear Mr. Roper:—I find the above tract of land on the book for the year 1910 assessed at $603 and building $600, making a total of $1,103." This letter is purported to be signed by John T. Hargrave.

The letter is here offered in evidence and the Commissioner is asked to file same marking it C. M. D. No. 3.

Memo.—Counsel for Mr. Dean does not object to the foregoing illegal testimony and introduction of said letter, because he supposes the object is to avoid putting Mr. Hargrave on the stand and, knowing the high character of the person to whom the letter is addressed, is satisfied that Mr. Hargrave would testify to the facts (184) therein contained.

37th Q. Mr. Dean, were either you or Mr. R. Beale Davis, Jr., Trustee of the Estate of R. Crawley Jones, Bankrupt, parties to the bankruptcy proceedings, styled Aug. Wright Co., and others vs. R. Crawley Jones, either in the District Court of the United States for the Eastern District of Virginia, or in the United States Circuit Court of Appeals, Fourth Circuit? A. I was a witness for the petitioning creditors in the District Court of the United States for the Eastern District of Virginia, and

I was the surety on an appeal bond in that case taken by R. Crawley Jones to the United States Circuit Court of Appeals. It is also my recollection that counsel filed a typewritten brief or memorandum of authorities in my behalf in the case in United States Circuit Court of Appeals. I also filed a petition in the District Court in said Bankruptcy proceedings, dated November 29th, 1911, a certified copy of which I herewith file, marked Exhibit C. M. D. No. 4. I also file as Exhibit C. M. D. No. 5 the rule of said District Court, issued upon said petition.

38th Q. Mr. Dean, why did you take charge of the notes of R. Crawley Jones taken up at the Virginia National Bank on September 3rd, 1909. Why did you not turn the same over to Mr. R. Crawley Jones if you had loaned $1,600.00 to be used in paying the same? A. The notes were turned over to me by J. Samuel Jones with the statement that he had been so directed by his son, and then also as an evidence that I loaned the money, and how it had been used.

The following were offered in evidence by Mr. Roper: Copy of order entered by United States District Court in the matter of R. Crawley Jones, Bankrupt, on December (185) 6, 1911, and which I shall ask the Commissioner to mark C. M. D. No. 6. I also offer in evidence an agreement entered into the 21st day of September, 1909, between R. Crawley Jones. Marie E. Jones, his wife, of the first part, W. P. Wells, Trustee, party of the third part, and Bartlett Roper, Jr., Attorney for the Petersburg Creditors of R. Crawley Jones, party of the fourth part, the paper not being signed by Claude M. Dean of the second part, which I shall ask the Commissioner to mark C. M. D. No. 7.

Memo.—Counsel for Claude M. Dean object to the filing of said last agreement marked C. M. D. No. 7, as both irrelevant and as being *res inter alios acta.*

Re-Direct Examination by Mr. Meredith, Counsel for Claude M. Dean.

1st Q. Without waiving objection to Exhibit No. 7, Counsel for Claude M. Dean asks the witness as follows: Why did you not sign the agreement marked C. M. D. No. 7? A. The agreement between Claude M. Dean and Bartlett Roper, Jr., Attorney, dated September 18th, 1909, and marked Exhibit C. M. D. No. 2, which I had agreed to, did not contemplate my entering into any

agreement with anyone else except Bartlett Roper, Jr., Attorney, and I consented to this agreement solely as an accommodation to Mr. Roper and the creditors whom he represented, and to assure them that I did not desire or wish to take any advantage whatever of any of the other creditors of Mr. Jones and, therefore, agreed to allow the substituted trustee to hold the funds amounting to $1,600.00, which he would get from the sale of some of the property named in the deed of trust, until Mr. Roper and the parties he represented had an opportunity, if they so desired in the future, to test the va-
(186) lidity of my deed, and, therefore, when this agreement, filed as C. M. D. No. 7, was presented to me I refused to sign it on the ground, in addition to the above reasons given and for the reason that I did not have anything else to do with Mr. Jones' property after a sufficient amount had been sold to cover the amount secured by my deed of trust, nor did Mr. W. P. Wells, Substituted Trustee in the deed of trust dated September 3rd, 1909, have a right to enter into such an agreement, when no such powers and authority were given him in the deed of trust given to me, nor did I wish to get in any complication regarding what disposition should be made of Mr. Jones' property after the notes secured by the deed of trust given me had been paid, and I, therefore, refused to sign the agreement dated September 21st, 1909, and filed in this cause as C. M. D. No. 7.

RE-CROSS EXAMINATION by Mr. Roper, Counsel for Complainant.

1st Q. Did not the agreement between Claude M. Dean and Bartlett Roper, Jr., Attorney, dated September 18th, 1909, contemplate a sale by W. P. Wells of all of the property named in the deed of trust to Edward C. Dean, Trustee? I read from the agreement, "The said Claude M. Dean to have the right to share in all funds in the hands of the substituted trustee, W. P. Wells, remaining from the sale of all goods, land, etc., under said deed of trust." Does not this contemplate that W. P. Wells would sell all of the goods named in the deed of trust? A. I do not think so, because, in the first place, I had no right to agree with anyone for the sale of Mr. Crawley Jones' property under the deed of trust given me over and above the amount of $1,600.00. The

(187) Trustee under the conditions and terms contained in the deed of trust I do not think had any right to sell more than sufficient to pay the notes amounting to $1,600.00 and the expenses. The agreement did not, in my mind, contemplate a further agreement between Mr. Bartlett Roper representing the Petersburg creditors and myself, except only in so far as to set out more fully that the trustee was to sell sufficient property to bring $1,600.00 and expenses and then deposit the same in the bank and hold it to await the decision of the United States Courts as to the validity of said deed, or until, by an agreement between the said Claude M. Dean and the said Bartlett Roper, Attorney as aforesaid, they directed it to be paid over or otherwise; and the further agreement contemplated, it was understood, was to set forth more fully and give me every protection that my interest required, as for instance if a suit was to be instituted to test the validity of said deed of trust, then it was to be done in a reasonable time, and that I would be protected so far as the interest on the money loaned was involved, and this was never done.

2nd Q. Mr. Dean, you are entirely correct in stating that you had no authority by this agreement to authorize Mr. Wells to sell any more than enough to pay your notes with interest and the cost of the sale. This is why it was necessary, in order to carry out our agreement, that Mr. R. Crawley Jones be made a party to the agreement, so that the Trustee would be authorized to carry out the agreement as we contemplated it. Please examine the agreement between R. Crawly Jones and Bartlett Roper, Attorney, marked C. M. D. No. 7, and see if it was not the purpose and intention of this agreement to carry out the agreement between us shown by Exhibit C. M. D. No. 2, it being necessary that R. Crawley Jones give (188) his consent that W. P. Wells, Trustee, sell all of the property named in the deed of trust, and not only sufficient property to pay the amount of your notes? A. The agreement spoke for itself, and I did not sign it because I did not care to assume any responsibility as to the sale of the balance of Mr. R. Crawley Jones' property, nor did I wish to sign a paper which I did not think I had anything to do with.

By agreement of counsel signature of witness was waived.

(189) **OPINION AND FINAL DECREE.**

Filed and Entered April 14, 1913.

Pursuant to the order of this Court made on the 28th September, 1912, the defendant, Claude M. Dean, filed his answer to the bill of complaint herein, and the cause being at issue testimony was taken on behalf of the Complainants and Defendants, and thereupon the cause came on to be heard upon the pleadings and testimony and was heard on the 15th day of February, 1913.

The Court has carefully considered all the testimony taken in the cause since the filing of the opinion heretofore filed on the 25th July, 1912, as bearing upon the conclusions of law and fact found in that opinion.

The conclusions of fact therein were based largely upon the testimony and admissions of the defendant, Claude M. Dean. The testimony given by him on the issues herein since that time is substantially the same as that submitted to the Court for consideration on the previous hearing. Nor does the Court find any reasons for modifying the conclusions of law found in the opinion filed 25th July, 1912, to which reference is now made for a more extended discussion of the principles of law governing the case.

(190) And now on such final hearing the Court finds the following conclusions:

CONCLUSIONS OF FACT.

1. On September 1st, 1909, R. Crawley Jones, the Bankrupt, was insolvent, and being insolvent wrote the following letter to the defendant, Claude M. Dean, who was his brother-in-law, the said R. Crawley Jones having married the sister of the said Claude M. Dean:—

Darvils, Va., Sept. 1st, 1909.

Dear Claude:—

I am in serious trouble and need your help at once badly, being charged with a very grave offense under the law and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600.00 in cash I will be saved. So for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give you notes for the amount, and a deed of trust on everything I have or possess to secure you. All I need is a little time, for I have enough to more than pay you five times over again. It is absolutely necessary that I

have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes inclosed for the amount, and as soon as you prepare deed of trust I will sign same.

Sincerely yours,

R. C. JONES.

2. That at the date of writing the said letter or prior thereto the said R. Crawley Jones was threatened with or under apprehension of criminal prosecution concern-
(191) ing certain endorsements on notes made by the said R. Crawley Jones and purporting to bear the endorsements of certain persons, which endorsements were claimed or alleged to be not genuine. Some of these notes were at that date held by the Virginia National Bank of the City of Petersburg, some of them being not yet due.

3. This letter was delivered to Claude M. Dean by J. Samuel Jones, the father of R. Crawley Jones, on the 2nd of September, 1909, and the said J. Samuel Jones at the time of the delivery of the letter to Claude M. Dean gave him further information as to the threatened or impending criminal prosecution against R. Crawley Jones for charges connected with the endorsements upon these notes, and at the same time gave him information as to the financial condition of R. Crawley Jones. Thereupon Claude M. Dean informed J. Samuel Jones that he would make arrangements to raise the money the next day if the Bank would agree to payment then, which information was to be ascertained by Mr. J. Samuel Jones and telegraphed to Claude M. Dean that day, which was done.

4. On the 3rd of September, 1909, Claude M. Dean raised the money and met J. Samuel Jones in Petersburg. Thereupon the two first went to a Bank in Petersburg, where certain notes of the same character were paid by money advanced by J. Samuel Jones, and then they went together to the Virginia National Bank of Petersburg, where to the $1,600.00 furnished by Mr. Dean there was added enough by Mr. J. Samuel Jones to take up the notes with the questionable endorsements held by the Virginia National Bank. The notes taken up at the Virginia National Bank were not marked paid, but were delivered to Claude M. Dean when the money was paid, and by him some time afterwards handed over to R. Crawley Jones.

(192) 5. On the 3rd September, 1909, Mr. Claude M. Dean before the notes were taken up had certain conversations with the Cashier of the Virginia National Bank at Petersburg. What was the tenor of these conversations is a matter of contradiction in the testimony between Mr. Dean and the Cashier Mr. Long, but as the determination of the correctness of the conversations stated by either is not in the Court's opinion necessary for the decision of this case no conclusion of fact dependent upon the conflicting testimony of the two is found thereon.

6. After the retirement of the notes Mr. Dean prepared a deed of trust by way of mortgage to be signed by R. Crawley Jones to secure the notes stated in his letter dated September 1st, 1909, amounting to $1,600.00. These notes were four in number, all dated the 1st day of September, 1909, payable respectively at 7, 30, 60 and 90 days after date. On the non-payment of any note at maturity all the others became at once due and payable. The first note was for $100.00, and matured on the 10th September, 1909. The other notes were for $500.00 each. On the 10th of September, 1909, the deed of trust prepared by Mr. Claude M. Dean to be signed by R. Crawley Jones was executed by R. Crawley Jones and his wife. It was dated the 3rd of September, 1909. This deed of trust covered the entire property of R. Crawley Jones, viz., it covered all his household goods and furniture, all his kitchen furniture, all his live stock, all his crops growing and cut, all his stock of goods and merchandise, all his store fixtures and furniture, all his accounts and bills receivable, and all his landed property. The trustee named in the deed of trust was Mr. E. C. Dean, the father of Mr. Claude M. Dean.

(193) 7. On the 11th September, 1909, Claude M. Dean, the first note not having been paid, directed the trustee under the deed of trust by way of mortgage to take possession of the property covered by the mortgage and proceed to execute the same, and the trustee thereupon took possession on the 13th September, 1909.

8. Thereafter by agreement the defendant, William P. Wells, was substituted as trustee under the deed of trust in lieu of Mr. E. C. Dean upon agreement that he should hold the proceeds of sale of the mortgaged property subject to the determination of the Court as to the validity of the deed of trust.

9. On the 24th December, 1909, a petition for involuntary Bankruptcy was filed against R. Crawley

Jones, which was resisted by him, but on which he was subsequently on the 25th April, 1910, adjudicated bankrupt, and it appeared that he was insolvent both on the 1st of September, 1909, and thereafter.

10. The substituted trustee, William P. Wells, disposed of the property covered by the deed of trust which realized the sum of $1,634.00, which is held to meet the result of this litigation and practically represents the entire bankrupt estate.

11. That the Bankrupt R. Crawley Jones on the 1st of September, 1909, knew that he was insolvent; and knew that the Virginia National Bank of Petersburg held notes of his upon which he was liable to criminal prosecution by reason of charges concerning the endorsements thereon, and was entirely convinced of the necessity of the retirement of these obligations so as to get them out of the hands of the holders, and do away with the possibility of criminal proceedings against himself based upon them.

(194) 12. That Claude M. Dean before furnishing the $1,600.00 made no investigation of the affairs of R. Crawley Jones beyond the conversation had by him with J. Samuel Jones, the father of R. Crawley Jones, and the conversations had by him with John W. Long, the Cashier of the Virginia National Bank of Petersburg, the tenor of which is the subject of the conflict of testimony between Mr. Long and Mr. Dean.

13. That Claude M. Dean desired to assist R. Crawley Jones, the Bankrupt, who was his brother-in-law, and to rescue him from the disgraceful exposure which threatened him, and for that purpose consented to furnish the money which was sought of him to be advanced.

14. That Claude M. Dean under the circumstances at the time of the appeal to him to advance the money had reasonable cause to believe that R. Crawley Jones was then insolvent and that by reasonable examination of the affairs of R. Crawley Jones, if such examination had been made at the time, he would have been able to ascertain that R. Crawley Jones was in fact then insolvent.

15. That Claude M. Dean knew that the effect of giving the mortgage to him and the use of the money lent by him to pay the notes held by the Bank would be to retire those notes in full which were obligations held by existing creditors leaving to all other creditors only what might remain out of the proceeds of all the property of R. Crawley Jones after the payment in full under

the mortgage of the amount loaned by Claude M. Dean to retire those existing notes upon which were the questionable endorsements.

16. That some of the stock of goods and merchandise mortgaged to Claude M. Dean, the sale of which constitutes a portion of the proceeds of the mortgaged property, consisted of goods furnished by unsecured creditors which goods had not been paid for and which cred-
(195) itors are now among the unsecured creditors of the Bankrupt.

17. That Claude M. Dean knew that the money loaned by him would be applied to the payment of existing debts not in the ordinary course of business, but for the purpose of enabling R. Crawley Jones to avoid an apprehended criminal prosecution.

CONCLUSIONS OF LAW.

First: That Claude M. Dean must be presumed to have been aware under the facts in this case that the result of the application of the loans made by him to the retirement of these notes would be to substitute for existing unsecured debts the debt then incurred to him, giving it a priority for the purpose of accomplishing a particular result, to-wit, the retirement of existing unsecured debts upon which his brother-in-law was liable to criminal prosecution, and the substituting therefor of another debt to him, for the payment of which all his brother-in-laws's property was mortgaged.

Second: That when he accepted this mortgage Claude M. Dean under the facts must be presumed to have known that it was made in contemplation of the provisions of the Bankrupt Act in that it was intended to operate and actually operated to accomplish something which was forbidden by that Statute, to-wit, the substitution of a secured debt for and in the place of an unsecured debt which it was desired to pay in full so as to avoid criminal prosecution.

Third: That the deed of trust or mortgage in this case was made in contemplation of the provisions of the Bankrupt Act, and with intention to defeat the same, as the effect thereof was to give a preference to the holder of the mortgage in contravention of the prohibition of the Bankrupt Act.

IT IS THEREUPON ORDERED, DECREED AND ADJUDGED That the deed of trust from R. Crawley Jones and Marie E. Jones, his wife, to E. C. Dean, dated September 3, 1909, and recorded in the Clerk's Office of the Circuit

Court of Dinwiddie County, Virginia, on the 11th day of September, 1909, is invalid under the provisions of the Bankrupt Act, and is hereby set aside, vacated and declared null and void.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the defendant, W. P. Wells, the substituted trustee, do pay over to the complainant the sum of $1,634.00, with any interest thereon that may have accrued whilst the same was in his hands as representing the net proceeds of the property embraced in the said deed of trust to be administered and disbursed as part of the bankrupt estate free of any liens thereon by reason of said deed of trust hereinbefore vacated.

HENRY A. M. SMITH,
U. S. Dist. Judge for S. C. designated to sit in the Eastern Dist. of Va.

12th April, 1913.

(197) **ASSIGNMENT OF ERRORS.**

Filed May 10, 1913.

Now comes the defendant, Claude M. Dean, in the above entitled cause and files this, his assignment of errors therein, upon which he intends to rely in his appeal, and says that said District Court made errors in its rulings and orders and decrees as follows:

1. In overruling the demurrer of the said Claude M. Dean to the bill filed in this cause.

2. In failing to sustain said demurrer to said bill and in failing to dismiss said bill.

3. The Court erred in holding as a conclusion of fact that on September 1st, 1909, R. Crawley Jones was insolvent.

4. That the Court erred in holding as a conclusion of fact that the tenor of the conversations between said Dean and the Cashier Long was a matter of contradiction, because the proof shows that the said Long did not contradict the said Dean, but simply claimed that he was unable to recollect whether certain statements had been made by him to the said Dean or not, although the said Dean testified that he was positive they were made by the said Cashier.

5. That the Court erred in not giving due and proper weight to the testimony of the said Claude M. Dean, (198) concerning the information obtained by him from said Cashier.

6. The Court erred in holding as a conclusion of fact that it appeared that R. Crawley Jones was insolvent, both on the 1st day of September, 1909, and thereafter, as there is no proof in this case of the alleged insolvency of the said R. Crawley Jones at any date prior to the filing of the petition to adjudicate him a bankrupt on December 24, 1909, at which date the decision of the U. S. Circuit Court of Appeals held him to have been insolvent.

7. The Court erred in holding as a conclusion of fact that said W. P. Wells, substituted trustee, disposed of all the property covered by the deed of trust of September 3, 1909, from which he realized the sum of $1,634.00 and that the same practically represents the entire bankrupt's estate. On the contrary, the proofs show that the farm, all the household furniture and a large portion of the accounts as well as other property covered by said deed of trust were not sold thereunder because the trustee, having sold sufficient to pay the debt so secured, was without authority to make any further sale of said property, because the proofs in this case do not show that the said R. Crawley Jones did not have any other property than that set forth in said deed of trust.

8. The Court erred in holding as a conclusion of fact in this case that R. Crawley Jones on the 1st of September, 1909, knew that he was insolvent, as there is no proof of such knowledge on his part in this case.

9. The Court erred in holding as a conclusion of fact that the investigation set out in paragraph 12 of the Court's conclusions of fact, was not such an investigation of the affairs of R. Crawley Jones by the said Claude M. Dean as would be a sufficient compliance with the requirements of the bankrupt law.

10. The Court erred in holding that Claude M. Dean (199) consented to furnish the money because he desired to rescue the said R. Crawley Jones from the disgraceful exposure which threatened him, since the uncontradicted evidence is that the said Dean would not have loaned said money had he not by the previous investigation he had made become satisfied that the security for the said loan was good and that the said R. Crawley Jones was not insolvent.

11. The Court erred in holding as a conclusion of fact that the said Dean under the circumstances at the time he advanced the money had reasonable cause to believe that R. Crawley Jones was then insolvent, and also in holding that by reasonable examination of the af-

fairs of R. Crawley Jones, if such an examination had been made at the time, he, the said Dean, would have been able to ascertain that R. Crawley Jones was in fact then insolvent.

12. The Court further erred in not holding that the evidence in this case shows that said Dean, at the time he advanced the money and at the time he took the deed of trust did not have reasonable cause to believe that the said Jones was then insolvent.

13. The Court also erred in not holding that the said Dean did make every reasonable examination and inquiry into the affairs of the said Jones that he was called upon to make, and that he became satisfied that the said Jones was solvent and was only in need of some ready cash to tide him over his threatened embarrassment so that he could continue his business.

14. The Court erred in holding that nothing would be left the other creditors after paying in full the notes secured by the mortgage of September 3, 1909, particularly is this so, if as is now claimed by the trustee in bankruptcy R. Crawley Jones was insolvent and that the note holders knew or should have known by exercise of due diligence that he, the said R. Crawley Jones, was insolvent since, in that event, the note holders being existing creditors, the payment of their debts amounting (200) to some $2,500.00 was a preference and being within four months said sum could have been recovered from said existing creditors and the said $2,500.00 applied to the payment of the general creditors.

15. The Court erred in holding as a conclusion of fact that Claude M. Dean knew that the money loaned would be applied to the payment of certain existing debts in order to enable R. Crawley Jones to avoid an apprehended criminal prosecution, if it was intended to further hold that that circumstance tainted or made illegal the security taken by the said Dean at the time the loan was made, so as to make it impossible to allow said Dean to retain the proceeds of sale under said deed of trust.

16. The Court erred in holding that Claude M. Dean must be presumed to have been aware that the result of the payment of these notes and the taking of security for the money advanced by him was for the purpose of retirement of certain unsecured notes upon which his brother-in-law was liable for criminal prosecution, and the substitution therefor of another debt to him, for the payment of which all of his brother-in-law's property was mortgage, since the uncontradicted evidence shows

that Dean was not willing or able to loan said money to enable his brother-in-law to avoid the publicity of such charge, and he would not have loaned the same if he had not after making diligent inquiry been assured of the solvency of the said R. Crawley Jones.

17. The Court erred in holding as a conclusion of law that when Dean accepted said mortgage he must be presumed, under the facts in this case, to have known that it was made in contemplation of the provisions of the Bankrupt Act and with a view to accomplish something that was forbidden by such statute, viz., the substitution of a secured debt for an unsecured debt, which it was desired to pay in full so as to avoid criminal prosecution.

(201) 18. The Court erred in holding as a conclusion of law that the deed of trust or mortgage in this case was made in contemplation of the provisions of the Bankrupt Act, and with intention to defeat the same, since the effect thereof was to give a preference to the holders of the mortgage in contravention of the prohibition of the Bankrupt Act, because the Court in its previous opinion of July 25, 1912, held that on September 3, 1909, Claude M. Dean was not a creditor of R. Crawley Jones, and that the giving of the deed of trust of September 3, 1909, was not a preference, since the said Dean was not a pre-existing creditor, but was a mortgage given for a present actual consideration.

19. The Court erred in directing and ordering the defendant, W. P. Wells. substituted trustee, to pay over to the complainant, R. Beale Davis, Jr., trustee, the sum of $1,634, with accrued interest, and in directing said proceeds to be administered and distributed as part of the bankrupt estate free from the lien of the said deed of trust dated September 3, 1909, and also erred in directing said deed of trust vacated.

20. The Court having, by its opinion and decree of July 25, 1912, held that the deed of trust of September 3, 1909, was given for a present actual valuable consideration, and was not given as a mortgage by way of preference to a pre-existing creditor so far as the said Claude M. Dean was concerned, and was properly recorded, it erred in not further holding that the said deed of trust was given by the said R. Crawley Jones in good faith and not in contemplation of or in fraud upon the Bankrupt Act; or if not given by the said R. Crawley Jones under the foregoing circumstances, it erred in not holding that the said deed of trust was accepted by the said

Claude M. Dean in good faith and not in contemplation
(202) of or in fraud upon the Bankrupt Act, and that said deed of trust was not affected by the Bankrupt Act.

21. The Court erred in not holding that the deed of trust of September 3, 1909, was not given by the said R. Crawley Jones with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, and in not holding that the said Claude M. Dean was a purchaser in good faith as well as for a present fair consideration, and that said deed of trust was a valid lien and not void as against the creditors of the said R. Crawley Jones.

22. The Court erred in not holding that the defendant Claude M. Dean accepted the said deed of trust, dated September 3, 1909, in good faith as security for a present cash loan of $1,600.00 and without any intent or purpose of aiding said Jones to hinder, delay or defraud his creditors, and not in contemplation of or in fraud of the Bankrupt Act, or any of its provisions, believing him to be solvent and that he would continue his business; and it further erred in not holding that the said defendant Claude M. Dean did not believe or did not have reasonable cause to believe that the said Jones intended to prefer him over his other creditors.

23. The Court also erred in not holding that the purpose and intent of the bankrupt in borrowing the said $1,600.00, and that of the said Claude M. Dean in loaning the same, was to enable the said Jones to continue his business, and not for the fraudulent purpose of diminishing his assets; and that said Dean made the loan and received the deed of trust as a security therefor in good faith.

24. The Court erred in not holding that the said Claude M. Dean did not know and did not have reasonable cause to believe that at the time of his interview with the said J. Samuel Jones in the City of Richmond on September 2, 1909, or on September 3, 1909, the occa-
(203) sion of his visit to the City of Petersburg, or at the time of the execution of the said deed of trust on September 10, 1909, that the said R. Crawley Jones was insolvent.

25. The Court erred in not holding that the deed of trust from R. Crawley Jones and wife to E. C. Dean, Trustee, dated September 3, 1909, and recorded in the Clerk's Office of the Circuit Court of Dinwiddie County, Virginia, on September 11, 1909, was a valid transfer under the provisions of the Bankrupt Act.

WHEREFORE, the said Claude M. Dean prays that the judgment and decrees of the said District Court appealed from be reversed and the cause remanded with directions to dismiss the bill, and for such other and further relief as may be proper in the premises.

CLAUDE M. DEAN,

By WYNDHAM R. MEREDITH,
Counsel.

(204)

MEMORANDUM REQUIRED BY SEC. 7 OF RULE 14.

Petition for an appeal filed May 10, 1913.

Appeal allowed May 10, 1913.

Appeal bond dated May 12, 1913. Penalty $100. Obligors: Claude M. Dean, principal, and National Surety Company surety, condition for costs and damages.

Citation dated May 10, 1913. Service admitted.

General replication filed by R. Beale Davis, Jr., Trustee, on Oct. 17, 1912.

(205)

STIPULATION OF COUNSEL AS TO RECORD.

Filed May 16, 1913.

IT IS HEREBY STIPULATED AND AGREED That the following papers, &c., shall constitute and be printed as the record on appeal to the U. S. Circuit Court of Appeals for the Fourth Circuit in the above entitled cause, to-wit:

1. Bill of Complaint, process and Marshal's return.
2. Exhibit "A," Deed of Trust, dated Sept. 3, 1909.
3. Exhibit "B," Agreement between C. M. Dean and Bartlett Roper, Jr., Atty.
4. Exhibit "Testimony of Claude M. Dean, given in the case of Aug. Wright, et al *vs.* R. Crawley Jones."
5. Demurrer filed by Claude M. Dean.
6. Stipulation of counsel contained in letter of Claude M. Dean to Roper & Davis under date of June 13th, 1912, and letter of Roper & Davis to Claude M. Dean under date of June 17th, 1912.
7. Opinion on Demurrer filed July 25, 1912.
8. Decree on Demurrer filed July 25, 1912.
9. Answer of W. P. Wells, Trustee.
10. Order limiting order of July 25, 1912, to overruling

demurrer only, filed Sept. 28, 1912.

11. Answer filed by Claude M. Dean, and exhibits "C. M. D. No. 1" and "C. M. D. No. 2."
12. General replication, or memorandum showing date of filing of replication and by whom filed as required by Section 7 of Rule 14, Circuit Court of Appeals.
13. Depositions taken and filed on behalf of complainant.
14. Depositions taken and filed on behalf of complainant in rebuttal.
15. Exhibit "B. C. S. 'A.'"
16. Exhibit "B. C. S. 'B.'"
17. Exhibit J. M. Q. No. 1,—Deed from Jones and wife to Quicke, Trustee.
18. Exhibit W. P. W. No. 1.
19. Exhibit W. P. W. No. 3.
20. Depositions taken and filed on behalf of Claude M. Dean, defendant.
21. Opinion and final decree filed and entered April 14, 1913.
22. Assignment of Errors.
23. Memorandum required by Sec. 7, Rule 14, Circuit Court of Appeals.

(206) It is further stipulated and agreed that in printing the record the style of the Court and the title of the cause to the various papers constituting the record need not be printed; and it is further agreed the captions, headings and certificates of the notary public to the depositions need not be printed.

It is further stipulated and agreed that the following original papers and exhibits be certified up to the Circuit Court of Appeals to be used by either party on the argument of the case in that Court, to-wit:

1. All of the exhibits filed with the deposition of the defendant Claude M. Dean.
2. Exhibit "X" being the original schedules filed by R. Crawley Jones, Bankrupt, on March 23, 1911.

WYNDHAM R. MEREDITH,
Atty. for Appellant.

BARTLETT ROPER, JR.,
Atty. for R. Beale Davis,
Jr., Trustee in Bankruptcy
of R. Crawley Jones.

(207) **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA, ss:
Eastern District of Virginia.

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings made up in accordance with stipulation of counsel, as appears herein, in the case of R. Beale Davis, Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, complainants *vs.* W. P. Wells, substituted trustee, and Claude M. Dean, defendants.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court at the City of Richmond, Virginia, this 18th day of June, A. D. 1913.

(Seal of Court)

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

By R. E. POWERS,
Deputy Clerk.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1194.

Claude M. Dean, Appellant,
vs.
R. Beale Davis, Jr., Trustee in Bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

June 18, 1913, transcript of record is filed and the cause docketed.

Same day, original petition for appeal, order allowing appeal, apeal bond, and citation, are certified up under Sec. 7 of Rule 14.

Same day, appearance of Wyndham R. Meredith is entered for the appellant.

Same day, twenty-four copies of the printed record are filed.

July 12, 1913, appearance of Bartlett Roper, Jr., is entered for the appellees.

November 1, 1913, original exhibits (Complainants' exhibit "X" and defendant's exhibit "C. M. D." 1, 2, 3, 4, 5 and 6, certified up.

November 25, 1913 (November term, 1913), cause came on to be heard before Pritchard and Woods, Circuit Judges, and Rose, District Judge, and is argued by counsel and submitted.

February 11, 1914 (February term, 1914), court announced and filed its opinion, which is as follows, to-wit:

OPINION.

Filed Feb. 11, 1914.

United States Circuit Court of Appeals.

FOURTH CIRCUIT.

No. 1194.

CLAUDE M. DEAN, Appellant,

versus

R. BEALE DAVIS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, ET AL., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond, In Bankruptcy.

[Argued November 25, 1913. Decided February 11, 1914.]

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WYNDHAM R. MEREDITH for appellant, and BARTLETT ROPER, JR., for appellees.

WOODS, Circuit Judge:

1. The property of R. Crawley Jones, bankrupt, was sold by consent, and the proceeds of the sale are now in the hands of the trustees awaiting final decision of the question whether they should be paid to the general creditors of the bankrupt or to Claude M. Dean who claims under a deed of trust or mortgage alleged by the creditors to be invalid under the terms of the Bankruptcy Statute.

2. The District Judge held first, that Dean was not a creditor when the trust deed was executed, but on the contrary took the trust deed as security for money lent at the time, and that therefore the deed of trust could not be annulled as a preference given to an existing creditor under section 60b of the Bankrupt Statute; and second, that while Dean had no purpose to benefit himself and was guilty of no moral obliquity, yet that when he accepted the deed of trust he had reasonable cause to believe that Jones was insolvent and that its effect would be to defeat the provisions of the Bankrupt Law, and on this ground adjudged the deed of trust fraudulent under section 67e of the act.

3. The petition of the trustee attacking the trust deed seems to have been framed in main reliance on section 60b, forbidding preferences to antecedent creditors rather than on section 67e declaring void transfers made to hinder, delay or defraud creditors. But this is not important, since the allegations of fact contained in the petition are sufficient to support a decree annulling the deed of trust under either section.

4. This court must affirm the judgment of the trial court if it finds in the record any reason which it considers sound, even though the District Judge may have rejected that reason and rested his decree on some other ground. *Erwin* vs. *Lowry*, 48 U. S., 172. We are free, therefore, to consider whether the deed to Dean should be annulled as an unlawful preference under section 60b, although the District Court held that it was not such a preference.

5. The material facts may be thus shortly stated: R. Crawley Jones, a merchant and farmer at Darvills, Virginia, was adjudged a bankrupt on 25 April, 1910, under a petition filed by his creditors 24 December, 1909. On 1 September, 1909, Jones wrote and sent by his father, J. Samuel Jones, the following letter to his brother-in-law, Claude M. Dean, residing in Richmond.

6. "I am in serious trouble and need your help at once, badly, being charged with a very grave offence under the law and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600 in cash I will be saved, so for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give you notes for the amount, and a deed of trust on everything I have or possess to secure you. All I need is a little time, for I have enough to more than pay

you five times over again. It is absolutely necessary that I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes enclosed for the amount and as soon as you prepare deed of trust I will sign same."

7. Inclosed with the letter were notes dated 1 September, 1909, one being for $100 and the others for $500 each, the first due 10 September, 1909, and the others at 30, 60 and 90 days after date. The charge against Jones referred to in the letter was the forgery of the indorsements of certain notes held by Virginia National Bank of Petersburg. Dean had no previous knowledge of R. Crawley Jones' embarrassment and J. Samuel Jones assured him that his son's debts were comparatively small. Actuated entirely by a desire to aid his brother-in-law, with no expectation of benefit to himself, Dean immediately agreed to procure the $1,600 requested. On 3 September he went with J. Samuel Jones to the bank, furnished the money, which was handed to the cashier by J. Samuel Jones, and received from the cashier by the hand of J. Samuel Jones the notes, some of which had not matured, without mark of payment. The cashier testified the notes were not marked paid because he understood the transaction to be a sale of the notes to J. Samuel Jones, while Dean's explanation was that the stamp was not convenient at the time. R Crawley Jones was not present, but there can be no doubt that Dean was acting not only on his own behalf, but on behalf of R. Crawley Jones, the debtor, in conjunction with J. Samuel Jones. The deed of trust purporting to secure the four notes which had been sent to Dean with the letter, was not executed until 11 September, one day after the first note for $100 given to Dean had matured, the explanation being that R. Crawley Jones was so engaged in harvesting his crop that he could not spare the time to go to Richmond. The deed of trust covered all the property, both real and personal, of the debtor; and the day after its execution Dean directed his father, E. C. Dean, who was the trustee named in the deed, to seize and sell the property. The trustee took possession on 13 September, for the purpose of foreclosure and sale. There was a senior mortgage on the land which was barely met by foreclosure sale.

8. The insolvency of R. Crawley Jones at the time of this transaction is admitted; and it is difficult to im-

agine stronger reasons for Dean to believe him insolvent, short of having an accurate balance sheet of his assets and liabilities. The appeal in the letter to Dean of September 1, signified acute financial distress, and was notice that Jones had exhausted his credit, and had come to the end of his ability to obtain money in the ordinary course of business. True, it appears from Dean's testimony that he had the general opinion or assurance from the debtor and his father that the debtor had ample assets and small liabilities, but this assurance was on its face obviously irreconcilable with the declared condition of pecuniary distress. All men of affairs know that it is probable almost to the point of certainty that a merchant brought to the condition indicated by the letter of Jones to Dean would be owing considerable debts for goods purchased. One who takes a mortgage under such conditions covering a debtor's entire property is charged with the knewledge which due investigation as to debts and incumbrances would have given. A reasonable man must be charged, too, with knowledge that the execution of a mortgage covering the entire property of a merchant usually means a suspension of his business and bankruptcy. The immediate seizure of the property for default in the payment of a small note, assuming it to have been made in good faith, shows that Dean believed that prompt seizure and sale of the entire property was necessary to collect even his secured debt. Without further discussion it seems clear that the conclusion of the District Judge on this point is supported by the great weight of evidence.

9. We are unable to agree with the District Judge that the mortgage is protected from attack as an unlawful preference on the ground that it was given for a present consideration and not to obtain a preference for a pre-existing debt. It is true that Dean lent the money at the time the mortgage was executed and the principle is settled by the Supreme Court in *Van Iderstine* vs. *National Discount Co.*, 227 U. S., 575, that the mere knowledge of a lender that the money borrowed is to be applied to an existing debt does not make the security given invalid under section 60b as an unlawful preference or under section 67e as a fraud. But Dean has much more to overcome than mere knowledge that the money lent was to be used to pay an existing debt. Charged with notice of the insolvency of the debtor, his purpose was to extricate Jones from embarrassment by acting with and for him in preferring a pressing debt. In pursuance of

this purpose, as agent for the debtor and in his behalf he actively participated in satisfying the pressing creditor, and taking up the pressing debt by means of the secured debt to himself. Even if the bank's notes had been marked paid, the whole transaction showed on its face that there was not that novation that the Bankrupt Statute contemplates as necessary to the protection of a lender. Looking away from the form to the substance, by his participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt, Dean tied himself to the old debt, and the notes given to him must be regarded mere substitution of new papers for the old.

10. Where in such a transaction the lender acts as agent for the creditor the security has been held invalid. In re Beerman, 112 Fed., 663; *Alexander* vs. *Redmond*, 180 Fed., 92; *Walters* vs. *Zimmerman*, 208 Fed., 92; *Van Iderstine* vs. *National Discount Co., supra.* The reason is still stronger for holding it invalid when the lender acts as the agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his own benefit. If it were otherwise the purpose of the statute in securing equality among creditors could be defeated at the will of the debtor by the device of substituting a new debt for the old. The application of the principle on which this conclusion rests in the administration of trusts and in other branches of the law is familiar. The deed of trust to Dean must therefore be declared void under section 60b as an unlawful preference.

11. The mortgage is also obnoxious to condemnation under section 67e, as held by the District Judge. We should not attempt to add anything to his convincing decree on this point but for the strong reliance of counsel for appellant on the case of *Van Iderstine* vs. *National Discount Co.*, 227 U. S., 575, recently decided. That case really holds nothing more than had been previously decided in *Coder* vs. *Arts*, 213 U. S., 223, namely, that section 67e applies only to actual fraud as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent. But here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference which it was obvious would result in closing the business of the debtor. Actual fraud has

a large signification, and embraces any undue advantage taken of another. Dean, it is true, had no corrupt motive to benefit himself; on the contrary, he was impelled by a laudable and unselfish impulse to aid his brother-in-law in his troubles, and in the effort actually incurred labor and expense with no gain to himself. But the conclusion cannot be escaped that in his generous zeal he lost sight of the rights of the creditors. Having the strongest reason to believe Jones insolvent, he took a mortgage of his entire property in order to enable him to prefer one creditor to the exclusion of all others and enforced the mortgage, with the apparent consent of the debtor, by seizure almost at the instant of execution on the maturity of one small note. As a reasonable man he must be charged with knowledge that this course would inevitably result in the reduction of the value of the assets of a debtor already insolvnt, the payment of his preferred debt and the failure to pay other debts. All this was aiding and acting with Jones to compass the preference of one creditor to the exclusion of others—to take undue advantage of other creditors by depriving them of their rights conferred by the Bankrupt law to share equally in the distribution of the assets of an insolvent debtor. However innocent Dean may have been of any formed intention to accomplish such a purpose, he must be charged with this purpose and the consequences of his course of conduct, since in the administration of justice all men must be charged with intention to produce the results which the exercise of reason would make perfectly evident as the results to be anticipated. The decree of the District Court must be affirmed with costs against the appellant.

Affirmed.

PRITCHARD, Circuit Judge: I concur in the result.

DECREE.

Filed and Entered February 14, 1914.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 1194.

Claude M. Dean, Appellant,
vs.
R. Beale Davis, Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause, be and the same is hereby affirmed, with costs.

February 14, 1914.

C. A. WOODS,
Circuit Judge.

ORDER GIVING APPELLANT LEAVE TO PRESENT A PETITION FOR A REHEARING.

Filed and Entered March 14, 1914.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 1194.

C. M. Dean, Appellant,
vs.
R. Beale Davis, Trustee, &c., et al., Appellee.

Upon the application of counsel for Appellant and for good cause shown,

Special leave is hereby granted the appellant to present a petition for a re-hearing of this cause within 30 days from March 16, 1914, and the mandate in this cause is stayed pending said petition for a rehearing, provided the same is presented on or before April 16, 1914.

March 14, 1914.

J. C. PRITCHARD,
Senior Circuit Judge Presiding.

PETITION OF APPELLANT FOR A REHEARING.

Presented April 16, 1914.

United States Circuit Court of Appeals.

FOURTH CIRCUIT.

No. 1194.

CLAUDE M. DEAN, APPELLANT,

verses

R. BEALE DAVIS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, ET AL., APPELLEES.

Appeal from the District Court of the United States for the Eastern District of Virginia.

PETITION OF APPELLANT FOR A REHEARING.

The Appellant respectfully presents this his petition for a rehearing of this cause for the following reasons:

First: Because of the manifest error this court has inadvertently committed to the prejudice of the appellant, in its opinion, in deciding this case mainly upon a point or question not before it on this appeal.

It is the well settled rule of the Supreme Court that an appeal brings up for review only that which was decided adversely to the appellant, and that a party not appealing cannot take advantage of an error committed by the lower court against him. If the appellees in this case had desired to avail themselves of the alleged error

of the lower in deciding adversely to them the question of preference under §60b of the Bankruptcy Act, they should have taken a cross appeal. By omitting to do so, they admit the correctness of the decision of the lower court on this question as to them; and the case stood before this court the same as if the alleged error had been waived at the hearing.

Loudon v. *Taxing District*, 104 U. S., 771.
Chittenden v. *Brewster*, 2 Wall., 195.
Mail Co. v. *Flanders*, 12 Wall., 134-5.
Field v. *Barber Asphalt Co.*, 194 U. S., 621.

Therefore, the holding by this court that the deed of trust given Dean was void as a preference under §60b of the Bankrupt Act, was an error, because that question was not before it, and such a holding is, therefore, in direct conflict with the decisions and the well settled rule of the Supreme Court of the United States.

Second: Because the decision of this court on the only question properly before it, viz., whether or not the said deed of trust given to Dean is void under §67e of the Bankruptcy Act, is in conflict with the facts and proofs in the case as they appear in the printed record, and is also in conflict with the decisions of the Supreme Court of the United States and of this court.

Upon these grounds we respectfully insist that a rehearing should be granted, so that this court may correct these errors which are prejudicial to the appellant herein.

The two points will be discussed in the order above mentioned.

FIRST QUESTION.

Was the question, as to whether the giving of the said deed of trust to Dean was a preference and, therefore, void under §60b of the Bankruptcy Act, before this Court?

From an examination of the decision of the lower

court it will readly be seen that Judge Smith decided this question in favor of the appellant, Dean, and this is conceded by this Court in its opinion on page 2, paragraph 3, last sentence, and again at top of page 5.

The following authorities of the Supreme Court are cited in support of appellant's contention that the question, as to the deed of trust to Dean being a preference under §60b, was not before this court for decision:

AUTHORITIES.

The Supreme Court of the United States, in the leading case on the question in point, of *Chittenden* v. *Brewster*, 2 Wall., page 195, says:

"It does not appear from the proofs in the case, that executions had been issued, and returned unsatisfied, as averred in the bill, and for the proof of which the answer of defendants called; and it is objected by the counsel for the *appellees* that this defect is fatal to the right of the complainants to maintain their bill. *This would be so, if the appellees*, against whom the decree was rendered, *had appealed from the same*, as in the case of *Jones* v. *Green*. See also *Day* v. *Washburn*. *But here the complainants only have appealed, and the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself.* * * * *If the appellees desired to avail themselves of this error in the decree they should* have brought a CROSS APPEAL. By omitting to do so, *they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing.*"

The Supreme Court in the case of *Loudon* v. *Taxing District*, 104 U. S., on page 774, holds:

"The city took an appeal from that part of the decree which gave the appellant affirmative relief; but that appeal has been dismissed, under the ninth rule, for want of prosecution. The case stands here now as though no such appeal has been taken. The *city can, therefore, only be heard in support of the decree as it stands. This has long been the settled rule in this court. Canter* v. *American and Ocean Insurance Companies*, 3 Pet., 307;

Chittenden v. *Brewster*, 2 Wall., 191; *The Stephen Morgan*, 94 U. S., 599. *An appeal brings up for review only that which was decided adversely to appellant.* It is unnecessary to determine what might have been done in this case if the appeal of the city had not been formally dismissed for want of prosecution."

The Supreme Court in the case of *Bolles* v. *Outing Co.*, 175 U. S., page 268, cited with approval the foregoing cases, and held:

"Two other defences are interposed which go to the recovery of even the small judgment of one dollar and costs, and which, if sustained, would require the judgment of the court below to be reversed, and ultimately a verdict for the defendant. First, that the notice of the copyright, imprinted on the photograph, did not fill the requirements of the statute; and, second, that the copyright claimed by Bolles is not sanctioned by the Constitution. *It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below.* *Canter* v. *American, &c., Ins. Co.*, 3 Pet., 307, 318; *Chittenden* v. *Brewster*, 2 Wall. 191; *The Maria Martin*, 12 Wall., 31, 40; *The Stephen Morgan*, 94 U. S., 599; *Clark* v. *Killian*, 103 U. S., 766; *Loudon* v. *Taxing District*, 104 U. S., 771; *Cherokee Nation* v. *Blackfeather*, 155 U. S., 218."

The point in question was also decided by the Supreme Court in the case of *Mail Company* v. *Flanders*, 12 Wall., on pages 134 and 135, in which case it was held:

"Probable the decision in the matter of the steamer Iberville was placed upon the ground that the steamer was captured within our military lines subsequent to the publication of the proclamation issued by the commanding general at the headquarters of the army, announcing that "all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States.

"Much difficulty, to say the least, would have arisen in sustaining that part of the decree *if the respondents had appealed to this court, as the presiding* justice held that the Circuit Court had no jurisdiction of the case, but

inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, cannot be corrected. *Correction of the error is not sought by the appellants, and it is well settled law that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court.* (*The Mary Ford*, 3 Dallas, 198.) *Appellees may be heard in support of the decree, but not for reversal, as it is the privilege of both parties to appeal if they see fit and comply with the conditions prescribed by law.*" Citing *The William Bagaley*, 5 Wall., 412; *Chittenden* v. *Brewster*, 2 Wall., 191; *Harrison* v. *Nixon*, 9 Pet., 484; *Stratton* v. *Jarvis*, 8 Id., 4; *Buckingham* v. *McLean*, 13 How., 150; *Canter* v. *Am. Ins. Co.*, 3 Pet., 318.

The foregoing decision was cited with approval by the Supreme Court in the case of *Field* v. *Barber Asphalt Company*, 194 U. S., page 621, in the following language:

"If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. *If he fails to take such appeal the correctness of the decision as against him will be presumed.* Mail *Company* v. *Flanders*, 12 Wall., 130; *Chittenden* v. *Brewster*, 2 Wall., 191, 196."

The rule has been diligently followed by the various Circuit Court of Appeals.

Pauly Jail Bldg. & Mfg. Co. v. *Hemphill Co.*, 10 C. C. A., 600; *B. & L. Asso.* v. *Logan*, 14 C. C. A., 133-136.

See also:

Clark v. *Killian*, 103 U. S., 766, 769; *U. S.* v. *Blackfeather*, 155 U. S., 180-186.

No decisions in the federal courts in which this rule has been disregarded or doubted have rewarded a dili-

fent search, and the rule has been repeatedly affirmed and uniformly followed for half a century.

Another very strong evidence that this court did not have before it the question of the deed of trust being given in violation of Sec. 60b, is that the appellees themselves have not even asked for such relief in their brief, nor was any such relief asked for at the oral argument, but on the contrary, counsel for appellees, in response to a question by one of the Judges presiding in this case, made the positive statement at the bar of the court, that he relied entirely upon 67e in having the deed of trust set aside.

No such relief being asked for in the brief of the appellees or at the oral argument, and no cross-appeal having been taken from the ruling of the lower court under that section, we respectfully submit, for this court now to decide this case and hold the deed of trust in question void under Sec. 60b, would be taking the appellant by surprise and would be a great injustice to him. The appellant, therefore, respectfully prays that this court, in view of the fact that the decision of this court affirming the lower court is almost entirely based upon the fact that the giving of the said deed of trust is in violation of Sec. 60b, should grant a rehearing of this cause.

If the appellees had any right to have the deed of trust in question set aside under §60b of the Bankruptcy Act, the same has been waived by their failure to take a cross-appeal, and they cannot now be heard to complain of any adverse ruling thereon in the court below.

SECOND QUESTION.

Whether or not the deed of trust in question, under the facts and proofs established by the record in this case, is void under §67e of the Bankruptcy Act, in the light of the decisions of this Court, the Supreme Court of the United States, and the Supreme Court of Virginia?

For a proper discussion of this question, the opinion of this court, in so far as it relates to the deed of trust in question being void under §67e, is here printed in full (but for convenience is divided up into 9 parts), as follows:

"(1) The mortgage is also obnoxious to condemnation under section 67e, as held by the District Judge. We should not attempt to add anything to his convincing decree on this point but for the strong reliance of counsel for appellant on the case of *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, recently decided. That case really holds nothing more than had been previously decided in *Coder* v. *Arts*, 213 U. S., 223, namely, that section 67e applies only to actual fraud as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent.

(2) But here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference which it was obvious would result in closing the business of the debtor.

(3) Actual fraud has a large signification, and embraces any undue advantage taken of another.

(4) Dean, it is true, had no corrupt motive to benefit himself; on the contrary, he was impelled by a laudable and unselfish impulse to aid his brother-in-law in his troubles, and in the effort actually incurred labor and expense with no gain to himself.

(5) But the conclusion cannot be escaped that in his generous zeal he lost sight of the rights of the creditors.

(6) Having the strongest reason to believe Jones insolvent, he took a mortgage of his entire property in order to enable him to prefer one creditor to the exclusion of all others and enforced the mortgage, with the apparent consent of the debtor, by seizure almost at the instant of execution on the maturity of one small note.

(7) As a reasonable man he must be charged with knowledge that this course would inevitably result in the reduction of the value of the assets of a debtor already insolvent, the payment of his preferred debt and the failure to pay other debts.

(8) All this was aiding and acting with Jones to

compass the preference of one creditor to the exclusion of others—to take undue advantage of other creditors by depriving them of their rights conferred by the Bankrupt law to share equally in the distribution of the assets of an insolvent debtor.

(9) However innocent Dean may have been of any formed intention to accomplish such a purpose, he must be charged with this purpose and the consequences of his course of conduct, since the administration of justice all men must be charged with intention to produce the results which the exercise of reason would make perfectly evident as the results to be anticipated. The decree of the District Court must be affirmed with costs against the appellant."

ARGUMENT.

Discussing the different parts of the decision of this Court, in their numerical order, we respectfully submit our views and contentions as follows:

(1) This portion of this court's opinion is entirely in accord with appellant's contention, and is supported by the decisions of the Supreme Court in the cases of *Coder* v. *Arts*, 213 U. S., 223, and *Van Iderstine* v. *Discount Company*, 227 U. S., 575, and should be decisive of this case. However, this well established principle and rule of law as laid down by the Supreme Court, this court refuses to follow, because of the fact that it further finds that "here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference, which was obvious would result in closing the business of the debtor." The court seems to have lost sight of the fact at this point that Jones was also engaged in the business of farming. Wells testified that Jones' time was about divided between the store and farm, and that the farm was fairly a prosperous farm, with good crops. Record, pp. 77-9.

It is conceded that under the decision in the Van Iderstine case, *supra*, that even if Dean knew that Jones borrowed the money in order to pay off a debt, the transfer would not have been subject to attack by the Trustee, except for the fact that a petition in bankruptcy was filed

within four months thereafter. But it must be kept in mind the institution of such proceedings did not relate back and convert a lawful transfer into a fraudulent conveyance.

Payment by a failing debtor of a legitimate debt, even though he thereby intends to create a preference, is not a fraud under the Bankruptcy Act, and does not come within the provisions of section 67e or 70e of the Bankruptcy Act. Section 67e. applies only to transfers which are fraudulent at common law and does not apply to preferential transfers. *In re Bloch*, 142 Fed., 674, 676, 677; *Githens* v. *Shiffler*, 112 Fed., 505; *Coder* v. *Arts*, 152 Fed., 943; *In re Maher*, 144 Fed., 503; 509; *Tompkins* v. *Hunter*, 149 N. Y., 117; *Delaney* v. *Valentine*, 154 N. Y., 692, 700; *Shotwell* v. *Dixon*, 163 N. Y., 43; *Dodge* v. *McKechnie*, 156 N. Y., 514, 520; *Ex parte Stubbins, Re Wilkinson*, 17 Ch. Div., 58, 68."

(2) We respectfully submit that there is no evidence or proof in the record in this case that Dean acted as or was the agent of Jones, the bankrupt, or that he participated as such for his benefit in carrying out the alleged plan of preference. The uncontradicted testimony of Dean on this point is found in his answer to question 32 on page 107 of the record, which is as follows: "He (Jones' father) stated to me that his son, R. Crawley Jones, had directed *him* to get the money that I had agreed to loan and had given *him* directions as to the use of the same. He then stated to me that if I had the time that he would be glad if I would go with him to pay the money as directed by his son, which I did." * * * It being a mere coincidence that Dean was present when the money he loaned was used in paying the bankrupt's indebtedness to the bank.

However, if it is not in inself unlawful to prefer, nor *fraudulent for one though* insolvent to borrow in order to use the money in making a preference, how can it be said that such a transaction is made fraudulent just because the borrower acts through an agent in making the preference, when, if he had acted for himself directly, it would not have been fraudulent?

This court in the case of *Crim* v. *Woodford*, 136 Fed., 34, sustained liens as valid in transactions where the lender acted as agent of the borrower in making prefer-

ences. See pages 40 and 41 of this opinion as to the liens of Crim and Manown, which decision is in direct conflict with the decision in the case at bar.

For a further and a more conclusive answer to this portion of this court's opinion, we here again quote from page 582 of the decision of the Supreme Court in the *Van Iderstine case, supra,* as follows:

"The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is *malum per se* and the other *malum prohibitum*, and then only to the extent that it is forbidden. * * * *It is, therefore, not in itself unlawful to prefer nor fraudulent or one though insolvent to borrow in order to use the money in making a preference. So even that if the Discount Company knew that Fellerman borrowed the money in order to pay off an honest debt, the transfer ... uld not have been subject to attack by the Trustee, ... for the fact that a petition in bankruptcy was fil... in four months thereafter. But the institution ... ceedings did not relate back and convert a ... r into a fraudulent conveyance.*"

"Cases, under the pres... statute, like *In re Beerman,* 112 Fed., 663, relied on by the trustee, relate to transactions in which the *mortgagee was practically the representative of the preferred creditor* and where, consequently the conveyance was as much subject to attack as though it had been made directly to him. *But here the Discount Company was not a creditor of Fellerman & Son, and had no relation with the persons to whom the money was paid. National Bank of Newport* v. *National Bank of Herkimer,* 225 U. S., 178. The transfer, therefore, was not a preference to the Discount Company and could not be set aside *without proof that it knew that Fellerman not only intended to pay some of his creditors BUT TO DEFRAUD OTHERS.* The difference between the two classes of cases is authoritatively recognized by *Coder* v. *Arts,* 213 U. S., 223, where it was said that "an attempt to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one."

(3, 4 and 5) There is no allegation in the bill of complaint filed in this case, nor is there any proof contained in the record in this case, nor has there been any attempt to prove that Dean had any knowledge of Jones' intent to defraud his creditors. Without such an allegation and proof that Dean had knowledge of Jones' intent, at the time he loaned the money, to defraud his creditors, we respectfully contend and submit that the deed of trust in question, could not and should not, under the authority of the Supreme Court in the Van Inderstine case, *supra,* be set aside under Sec. 67e of the Bankruptcy Act. While, there may be sufficient facts alleged in the bill of complaint to the effect that Jones gave the deed of trust for the purposes of hindering, delaying and defrauding his creditors, yet we respectfully submit that there are no allegations in the bill, nor is there any proof in the record, to the effect that Dean had any knowledge of Jones' intent to defraud his creditors. The absence of this necessary allegation in the bill is easily accounted for by the fact that the bill of complaint filed in this case was originally, as stated in the opinion of this court, framed in main reliance upon having the deed of trust set aside under Sec. 60b of the Act. In fact the opinion of this court goes only to the extent of holding that Dean "*acted as the agent of the debtor for the distinct purpose of aiding him to prefer a particular debt.* (See page 5 of the opinion.) Under the bankrupt law one has a right to loan a debtor money, and take security therefor, although knowing the debtor would use the same in paying some of his creditors. *Van Iderstine* v. *Nat. Discount Co., supra; Githens* v. *Shiffler,* 112 Fed., 505, 507; *In re Hersey,* 171 Fed., 1001.

(6, 7, 8) For answer to this portion of this court's opinion, we respectfully call attention to the following quotation from *Loveland on Bankruptcy* (1912 Ed.), p. 950, and cases cited, as follows:

"The fact that the mortgagor was insolvent at the time the mortgage is given, and that the mortgagee knew it, does not effect the validity of a mortgage given in good faith and for a present consideration."

For further answer to this portion of this court's opinion, we respectfully call attention to the decision of the Supreme Court of the United States in the case of

Davis v. *Schwartz,* 155 U. S., on page 640, in which it was held:

"The fact that the execution of the mortgages was immediately followed by a delivery of possession of the property, so far from being a badge of fraud, has rather a contrary tendency, and was evidently resorted to to avoid an implication of fraud from the retention of possession by the mortgagor. A prompt and vigorous enforcement of an honest debt is by no means indicative of fraud, and it does not lie in the mouth of the plaintiff, who were themselves taking steps in the same direction as the mortgagees, to cavil at their success."

Again the Supreme Court, on page 639, in the same case held:

"But where a person, being lawfully indebted to several creditors, makes a mortgage or other conveyance to one for the open and avowed purpose of preferring him, then in the absence of a law of the forum prohibiting preferences, such mortgage or conveyance is valid, though it may operate to bar other creditors from obtaining satisfaction of their debts." * * *

Stewart v. *Dunham,* 115 U. S., 61; *Estes* v. *Gunter,* 122 U. S., 450; *Smith* v. *Craft,* 123 U. S., 436; *Huntley* v. *Kingman,* 152 U. S., 527; *Southern White Lead Co.* v. *Haas,* 73 Iowa, 399; and cases cited.

The decision of the Supreme Court of the United States in the case of *Coder* v. *Arts,* 213 U. S., 213, 242, so completely and fully answers this portion of this court's decision we quote the same as follows, without comment:

"The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and to *deprive others of the means of obtaining payment was not sufficient to avoid a conveyance;* but it was uniformly recognized that acting in good faith, a debtor might thus prefer one or more creditors."

In Collier on Bankruptcy (9th Ed.) on page 950, it is said:

"Deeds of trusts and other transfers made in good faith to secure present loans, protected under a State statute, are within the protection of clause d of this section (§67) and valid liens." Citing:

Crim v. *Woodford* (C. C. A. 4th Ct.), 136 Fed., 34.
Matter of Alden, 16 Am. B. R., 362.
In re Noel (D. C. Md.), 137 Fed., 694.
Wilder v. *Watts* (D. C. of S. C.), 138 Fed., 426.
In re Clifford, 136 Fed., 475.
In re Randolph (D. C. W. Va.), 26 Am. B. R., 623.

VIRGINIA CASES.

For further answer to these portions of this court's opinion, we respectfully call attention to the decision of the Court of Appeals of Virginia in the case of *Johnson* v. *Lucas*, 103 Va., p. 36:

"Fraud.—Preference by an INSOLVENT Debtor. In the absence of statute, State or Federal, forbidding it, an Insolvent debtor may, *without the imputation of fraud*, prefer one creditor to another, although the preferred creditor may know that the preference will have the effect of defeating the collection of other debts. This is not *hindering or delaying creditors* within the meaning of the statute against fraudulent conveyances, as they have no right to a priority."

See also *Johnston* v. *Witt Shoe Co.*, 103 Va., p. 611.
Alsop, et al. v. *Catlett, et al.*, 92 Va., p. 364.

"The fact that a deed of trust of all of an insolvent's property, executed to secure part of his creditors, provides for payment of the surplus to the grantor, is not of itself evidence of fraudulent intent."

Harvey v. *Anderson*, 2 Va. Dec., 385; *Enc. Dig. Va. & W. Va.* Reports, vol. 6, p. 590.

"Since a debtor has the right to pay one creditor in preference to another, so he may, *without imputation of fraud*, secure one creditor to prevent another from gaining an advantage."

Williams v. *Lord*, 75 Va., 390; *Johnson* v. *Lucas*, 103 Va., 36, 38; *Lucas* v. *Clafflin*, 76 Va., 269.

"Nothing can be more firmly settled than at common law, apart from the statutes of bankruptcy, a debtor, even in failing circumstances, until his property is specifically bound to the satisfaction of his debts, has an absolute right to dispose of it at his pleasure. He may give an undue preference to a part of his creditors, or even to one, and such preference * * * cannot be treated as a fraud.'

Alexandria Sav. Inst. v. *Thomas,* 29 Gratt., 483, 490; *Va. & W. Va. Dig.,* p. 590, vol. 6.

"At common law a man, though insolvent, until a lien became fixed in some way on his property, might, *without fraud,* convey or transfer it in trust, and prefer one creditor over another, even though it left no estate to pay other creditors."

Va. & W. Va. Dig., Vol. 6, p. 590; *Skipwith* v. *Cunningham,* 8 Leigh, 271.

In re Hawks, 30 Am. Bank Rep., 373, in which the question as to whether or not the evidence establishes fraud, it was held as follows:

"This leaves for determination the main question in issue—whether the evidence establishes fraud on the part of the Commission Company, in aiding the bankrupt to fraudulently obtain credit for the purchase of merchandise, whereby the Commission Company would finally be benefitted in the collection of the indebtedness due it.

"There are certain well-settled rules of law to guide the courts in the determination of such an issue. If the circumstances proven are just as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is unwarranted. *U. S. Fidelity & Guar. Co.* v. *Des Moines Nat. Bank,* 145 Fed., 373, 74 C. C. A., 553. To establish fraud, the proof must be clear, unequivocal, and convincing. *Jones* v. *Simpson,* 116 U. S., 609; *Thorwegan* v. *King,* 111 U. S., 549; *Walker* v. *Collins,* 59 Fed., 70; *Foster* v. *McAlester,* 114 Fed., 145; *Schagun* v. *Scott Mfg. Co.,* 162 Fed., 209. Proofs which only create suspicion are not sufficient to warrant a finding of fraud. *United States* v. *Hancock,* 133 U. S., 193. A mere pre-

ponderance of evidence, which at the same time is vague or ambiguous, is not sufficient to warrant a finding of fraud. *Lalone* v. *United States*, 164 U. S., 255.

AS TO THE ALLEGED FORGED ENDORSEMENT.

Much stress is laid by the learned Judge, who prepared the opinion of this court, upon the letter Dean received from Jones relative to his being charged with an offense. The proof in this case only shows that there was a mere rumor that one of the endorsements on the notes was not genuine. (Record, p. 103.) R. Crawley Jones' anxiety regarding this criminal charge is no proof of guilt, for, as he well says, that the disgrace of the charge would always cling to his family whether he were innocent or not. But even if we assume that such endorsement was actually forged by Jones, yet we submit, the use of the money obtained from Dean, to pay these notes along with others, cannot affect the legality of the security taken by Dean. The money raised on the alleged forged notes, as far as this record shows, was used in the business of the bankrupt, and hence was a valid debt against him. See *Peters* v. *Bain*, 133 U. S., 670, 679, 686.

The facts in the case at bar and those in the cases of *Ex parte Stubbins*, 17 Ch. Div. (L. R., 1881), p. 67-9, and *Ex parte Caldecott*, 4 Ch. Div. (L. R., 1876), p. 155 and 156, are so similar, and the decisions in these latter cases are so decisive of this case, we here print the same at length, as follows:

Ex Parte Stubbins.

17 Chancery Division, pp. 67, 68 and 69.

James, L. J.:

"The facts of the case are few and not in dispute. The debtor applied to the Appellant and offered to sell him a large quantity of goods, amounting in value to £2,050. The Appellant was reluctant to buy them, but to induce him to make the purchase the debtor communicated to him that he was in great difficulties, as he appears in fact to have been, his bankers having refused him any further credit, and also that he had misappropriated trust moneys belonging to a trust estate of which

he and the Appellant were trustees, and he told him in effect that he wanted to sell the goods in order to raise the money to make good that defalcation. Thereupon the appellant was minded to make the purchase, and he agreed to make it at a price to be fixed by means of samples which were to be sent to a London broker, who was to fix the proper trade price for them. This being agreed to, the money was paid to the debtor, who, with the knowledge of the purchaser, immediately went to a bank in which there was a joint trust account in the names of the trustees, and paid the purchase-money to the trust account, so as to make good his defalcation. The goods were delivered in pursuance of the contract. The particular goods, the subject matter of the contract at that time, did not, as it turned out, amount in value to the purchase-money paid, but an additional quantity was subsequently added to make up the value. After the bankruptcy, which did not take place until two months after this transaction, the trustee having investigated the matter applied to the County Court for an order directed against the trust estate, that is, against both the trustees as representing the trust estate, to restore the money which had been so paid to the bankers to the trust account. Upon hearing before the County Judge he was not persuaded to accede to the application in the form in which it was made; he declined to make any order against the trust estate as such, but he found his way to make an order against one of the two trustees, that is, against Mr. Gaunt, the purchaser, on the ground of a voluntary preference. He worked it out in this way—he considered that the £2,050, which was paid under the circumstances which I have mentioned, was a loan from the one trustee to the other to enable him to make good the defalcation, and that then the goods were delivered by way of voluntary preference in satisfaction of the debt which had been so created. The Chief Judge was of opinion that this view of the transaction could not be sustained, that, whether it could or could not be impeached upon other grounds, it would be impossible to convert that, which was really a payment in respect of goods to be delivered, into a loan, and then to treat the delivery of the goods as a payment or satisfaction of that loan. *In that view I entirely concur. It is impossible, as it seems to me, that the transaction can be converted from that which it was into something which it was not in order to bring in the doctrine of voluntary prefer-*

ence. And in truth the view of the case was abandoned upon the argument of the appeal before us; it was admitted by the Appellant's counsel that they could not sustain it. But it was pressed upon us that the order of the County Court Judge could be sustained on the ground that the sale was itself a fraudulent transfer, that is, that the transfer of goods to a purchaser for value with the view of using the purchase-money for a voluntary preference, the purchaser knowing this intention, was a fraudulent conveyance or transfer within the meaning of the 6th section of the Act. It appears to me that that view cannot be sustained. *In truth, a mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, has never been held to be in itself a fraud,* or an act of bankruptcy. It may be impeached on the ground that it is voluntary, but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud. *And, if that is not fraudulent within any principle of law, it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase-money for the purpose of making a voluntary preference, and the purchaser knows that that is the motive of the sale and the intention of the vendor with respect to the proceeds of the sale. It appears to me that it would be an extravagant extension of the doctrine of fraud on the bankruptcy law to hold that such a sale under such circumstances is of itself a fraudulent act or an act of bankruptcy.*

"It was then contended that the appellant might fall back on the original form of the application to the County Court Judge, for an order against the trust estate as such to restore the money which had been paid to the credit of the two trustees in the banking account of the trust estate, on the ground that that payment was a voluntary preference of the trust estate. It appears to me that that view also cannot be sustained. In truth the County Court Judge declined to accept it, and he must be considered to have dismissed the application so far as it was based upon any such view, and there has been no appeal from his decision in respect of that, and we have not really before us now any persons representing the trust estate. This might be sufficient to dispose of the application in that point of view. But I am of opinion

that the County Court Judge was right, and that it is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods by a debtor to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor at all. If a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anybody else, and does restore the money, it seems to me impossible to hold that such a payment can be treated as a fraudulent preference of a creditor."

Brett and Cotton, LJJ., concurred.

In re Mapleback, Ex Parte Caldecott.

4 Chancery Division, 155 and 156.

James, L. J., delivered the judgment of the Court (James, L. J., Baggallay, J. A., and Bramwell, J. A.), as follows:

"The Appellant complains of an order of the Chief Judge by which he was ordered to pay to the trustee of the bankrupt the produce of certain goods seized and sold by him.

"They were so seized and sold under a bill of sale duly registered by which the goods had been assigned.

"The consideration for the bill of sale was £100, then advanced, and £100 previously due. It is not questioned that the £100 was so previously due, and that there was really and truly advanced the further sum of £100.

"The right of the Appellant, which on this short statement of facts would seem unquestionable, is impeached on the following ground: Before advancing the second £100 the lender had received from the bankrupt a letter in the most piteous terms, informing him that a bill was becoming due at a banker's which bore the signature, forged, of the lender, and that the bank would, on dishonour of the bill, of course, apply then to the latter, which would lead to a discovery of the crime with all its consequences of punishment to the forger, and ruin

to himself and family. In the same letter he offered, if the advance were made, to give a security as well for that as the previous debt. Moved by this letter, the Appellant lent the money, which was applied in taking up the bill, and the security was given, as promised, for that advance and the previous debt. The Chief Judge was of opinion that the lending of the money under those circumstances was such a violation of public policy as to taint and avoid the whole security, and to make it impossible to allow the appellant to retain the proceeds of it, although actually realized and received by him. If the appellant had been plaintiff or claimant, he certainly would have been in a very difficult position. It was not compounding a felony; it might perhaps not have been strictly a misprison of felony, but it was a transaction which was intended to result, and did result, in preventing the discovery of a felony, and getting into the criminal's own hands the most important piece of evidence. It is, however, not necessary to express any actual judgment on how the case would have stood if the appellant had been plaintiff.

"But there is another consideration which appears to us sufficient to dispose of this case. If there was a legal misdemeanor, the bankrupt was a party to it. *In pari delicto, potior est conditio possidentis aut defendantis.* The bankrupt could not have recovered back the proceeds of the sale of the goods, and his trustee cannot be in a better position than the bankrupt. If the bankrupt had repaid the loan the trustee could not recover it. If the bankrupt had actually given money as a bribe, or parted with property for any other illegal purpose, his trustee could not recover it back any more than he could himself. This is not one of the cases in which the trustee in bankruptcy stands in a better position than the bankrupt. *For however wrong the transaction may have been in law, it was no wrong against the bankrupt law; there was nothing done with intent to delay or defeat creditors, or to defraud any one.* For all purposes of the bankrupt law, the bill of sale was a bill of sale for a past debt, and a sufficient present advance. And except where there is an offense against the bankrupt law, or against some law in favor of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt, and no other.

"The order of the Chief Judge was accordingly discharged."

The above case is cited with approval in the case of *Githens* v. *Shiffler,* 112 Fed., 505-507, and *Githens* v. *Shiffler* is cited by the Supreme Court in *Coder* v. *Arts,* 213 U. S. pp. 223-241.

And the same doctrine is followed by the Supreme Court in *Tiffany* v. *Boatman's Institutes,* 18 Wall., p. 388-9. In this case the Supreme Court said:

"In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor policy of the Bankrupt Act are violated if these collaterals be taken at the time the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which it is one of the great objects of the bankrupt law to prevent. The preference at which this law is directed can only arise in case of *an antecedent debt.* To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the debtor had a good reason to believe the debtor to be insolvent. But the giving of securities when the debt is created is *not* within the law, and if the transaction is free fram FRAUD IN FACT, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, *no matter what his condition may be,* and that the party making such advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect."

We respectfully submit that for the foregoing reasons and the authorities cited in support of same, that a

rehearing of this cause should be granted, and that the decree of the lower court should be reversed.

WYNDHAM R. MEREDITH,
Counsel for Appellant.

I, Wydnham R. Meredith, do certify that the foregoing petition is not interposed for delay, and that the rehearing asked for should be granted.

WYNDHAM R. MEREDITH.

ORDER DENYING REHEARING.

Filed and Entered June 13, 1914.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1194.

Claude M. Dean, Appellant,
vs.
R. Beale Davis, Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

This Court having at its February Term, 1914, rendered its decision affirming the decree of the said District Court appealed from in this cause, and the appellant, by his counsel, having on April 16, 1914, presented to the Court a petition for a rehearing of the cause, and the same having been carefully considered.

It Is Now Here Ordered by this Court that the rehearing asked for, be, and the same is hereby denied.

June 13, 1914.

J. C. PRITCHARD,
U. S. Circuit Judge.

ORDER STAYING MANDATE.

Filed and Entered June 13, 1914.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1194.

Claude M. Dean, Appellant,
vs.
R. Beale Davis, Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

Upon the Application of appellant, by his counsel Wyndham R. Meredith, and for good cause shown,

It Is Ordered that the mandate of this Court in this cause, be, and the same is hereby stayed pending an application of the appellant in the Supreme Court of the United States for a writ of *certiorari* to this Court, provided said application is filed in said Supreme Court on the second Monday in October, 1914.

June 13, 1914.

J. C. PRITCHARD,
Senior Circuit Judge Presiding.

ORDER STAYING MANDATE.

Filed October 10, 1914.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1194.

C. M. Dean, Appellant,
vs.
R. B. Davis, Jr., Trustee &c., et al., Appellees.

Upon Application of Appellant and for good cause shown,

It Is Ordered that the mandate of this Court in the above cause be stayed pending appellant's application in the Supreme Court for a writ of certiorari, provided said application is presented in said Supreme Court on or before Monday, November 3, 1914.

Oct. 10, 1914.

J. C. PRITCHARD,
Senior Circuit Judge.

Afterwards, to-wit: on November 24, 1914, a certified copy of the order of the Supreme Court of the United States denying petition for writ of certiorari filed.

On the same day, the mandate of the Circuit Court of Appeals is issued and transmitted to the District Court of the United States for the Eastern District of Virginia, at Richmond, in due form.

On the same day, original exhibits (Complainants' exhibit "X" and Defendant's exhibits "C. M. D. No. 1, 2, 3, 4, 5 and 6"), certified up to this court, are returned to the said District Court.

On the same day, original petition for appeal, order allowing appeal, and appeal bond, which were certified up to this court under Sec. 7 of Rule 14, are returned to the said District Court.

(172) **PETITION FOR AN APPEAL.**

Filed Jan. 27, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Claude M. Dean, Appellant,
versus
R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, and W. P. Wells, substituted trustee, Appellees.

Your petitioner, the appellant in the above entitled cause, respectfully shows that the above entitled cause is pending in the United States Circuit Court of Appeals for the Fourth Circuit, and that a decree has therein been rendered on the 14th day of February, 1914, affirming a decree of the District Court of the United States for the Eastern District of Virginia, that the cause is a controversy arising in a bankruptcy proceedings, and that the matter in controversy in said suit exceeds One thousand dollars, besides costs and interest; and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper cause to be reviewed by the Supreme Court on an appeal.

Wherefore, the said appellant prays that an appeal be allowed him in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Fourth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

WYNDHAM R. MEREDITH,
Counsel for Appellant.

(173) **ASSIGNMENT OF ERRORS.**

Filed Jan. 27, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

Claude M. Dean, Appellant,
versus
R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., Appellees.

And Now Comes the appellant, Claude M. Dean, by his solicitor, Wyndham R. Meredith, and says that in the record and proceedings herein there is manifest error, and that the United States Circuit Court of Appeals for the Fourth Circuit erred in this, to-wit:

1. The Circuit Court of Appeals erred in not reversing the order of the District Court overruling the demurrer filed by the appellant to the bill in this cause and in not remanding said cause with directions to sustain said demurrer and dismiss said bill.

(a) Because the bill only set out one ground for setting aside the deed of trust, and that was, that it had been given by Jones with intent to prefer Dean over his other creditors of the same class; and that the effect of said deed of trust was to enable the said Dean to collect a greater percentage of his debt than other creditors of the same class, and that Dean knew or had reasonable cause to believe that Jones intended, by the execution and delivery of said deed of trust, to prefer him over his other creditors of the same class, and the District Court having held in the order overruling the demurrer that Dean was not a creditor when the deed was executed, but on the contrary took the trust deed as security for money lent at the time, and that therefore the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankruptcy, and thus overruling the only ground of attack contained in the bill of complaint, there was nothing to do but to sustain the demurrer, and it erred in not doing so.

(b) Because there was no allegation in the bill that the deed of trust was given by the bankrupt with intent on his part to hinder, delay or defraud his creditors, or any of them, nor is there any allegation in the bill that the deed of trust is one that should be held null and void under the laws of this State, nor is there any allegation in the bill of any actual fraud on the part of either the said Jones or the said Dean; nor is there any allegation in the bill that the said deed of trust was either given by the said Jones or accepted by the said Dean in contemplation of bankruptcy or in fraud of the bankruptcy act, or not in good fatih.

(174) 2. The Circuit Court of Appeals erred in entering a decree affirming the decree of the District Court of the United States for the Eastern District of Virginia entered on April 14, 1913, in favor of the said R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, complainant in said court, against the defendant therein, the appellant here; and in not reversing said decree and remanding the cause with directions that the said W. P. Wells, substituted Trustee under the deed of trust in question, to pay over the said $1,634 he received from the sale of the property mentioned therein, to the said Claude M. Dean, the beneficiary in said deed of trust.

(a) Because said District Court erred in holding the deed of trust null and void under Sec. 67e of the bankruptcy act, for the reason that there is no allegation of any actual fraud on the part of either Jones or Dean contained in the bill; nor is there any allegation in the bill that the deed of trust in question was given by Jones or accepted by Dean not in good faith, nor is it charged that the deed of trust was made by Jones or accepted by Dean in fraud of the bankruptcy act; nor is there any allegation in the bill or attempt made to have the deed of trust set aside as having been given by the said Jones with intent and purpose on his part to hinder, delay or defraud his creditors or any of them; nor is there any allegation in the bill that the deed of trust in question is one that should be held null and void as against creditors of the bankrupt under the laws of this State; nor is there any allegation or facts contained in the bill of com-

plaint as amended by the exhibit filed therewith, which would justify a claim that the deed of trust was not accepted in good faith or in fraud of the bankruptcy act.

(b) Because the relief prayed for in the bill was to have the deed of trust set aside as an unlawful preference under Sec. 60b, whilst the relief that was sought to be granted by the District Court was the setting aside of the deed of trust on the ground that it was fraudulent under 67e, and therefore the relief given is plainly inconsistent with the relief prayed for:

(c) Because the District Court erred in holding the deed of trust in question null and void under Sec. 67e of the bankruptcy act, for the reason that the evidence and proof and the record in this case shows that the deed of trust was not given by the said Jones with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, but was given in consideration of a present valuable consideration, and not in contemplation of bankruptcy or fraud upon the act; and for (175) the further reason that the evidence and proof and the record in this case shows that the deed of trust was accepted by the said Dean in good faith as security for a present loan of $1,600, and without any intent on his part to aid the said Jones to hinder, delay or defraud his creditors, or any of them; and in good faith and not in contemplation of bankruptcy or fraud upon the act, and that he did not have a reasonable cause to believe the said Jones was insolvent; and for the further reason that the proof in this case shows that the said Dean was a purchaser in good faith and that said deed of trust has been recorded according to law.

3. The Circuit Court of Appeals, after deciding and holding (paragraph two of its opinion) that

"The District Judge held first, thta Dean was not a creditor when the deed of trust was executed, but on the contrary took the deed of trust as a security for money lent at the time, and that, therefore, the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankruptcy;"

erred in not sustaining this decision of the said District Court.

(a) Because from that decision of the District Court, which was adverse to appellees, the appellees took no cross-appeal to the Circuit Court of Appeals.

(b) Because this decision of the District Court that the deed of trust was not preferential under Sec. 60b of the Bankruptcy Act was rendered *res adjudicata* when appellees failed to take such cross-appeal, and even if erroneous could not be reversed by the said Circuit Court of Appeals, since a party not appealing cannot take advantage of an error committed by the lower court against him.

4. The Circuit Court of Appeals, after deciding and holding (in paragraph two of its opinion) that

"The District Judge held...second, that while Dean had no purpose to benefit himself and was guilty of no moral obliquity, yet that when he accepted the deed of trust he had reasonable cause to believe that Jones was insolvent and that its effect would be to defeat the provisions of the Bankrupt Law, and on that ground adjudging the deed of trust fraudulent under Section 67e of the Act."

erred in affirming this decision of the said District Court.

(a) Because said Court admits in its decision that Dean was not guilty of actual fraud, and the only ground on which the deed of trust in question can be held fraudulent and set aside under Sec. 67e of the Bankruptcy Act, under the bill, proofs and record in this case, is that of actual fraud; and for the further reason that the proofs in this case does not show that (176) Dean when he accepted the deed of trust he had reasonable cause to believe that Jones was insolvent, or that the effect would be to defeat the provisions of the Bankruptcy Law.

5. The Circuit Court of Appeals erred in not deciding and holding that the deed of trust from R. Crawley Jones and wife to E. C. Dean, Trustee, dated Sept. 3, 1909, and recorded in the Clerk's Office of the Circuit

Court of Dinwiddie County, Virginia, on Sept. 11, 1909, was a valid transfer under both Sec. 60b and Sec. 67e of the Bankruptcy Act.

(a) Because as to Sec. 60b the evidence and proof in this case shows that Dean did not have a reasonable cause to believe Jones was insolvent, and that he accepted said deed of trust in good faith and not in contemplation of bankruptcy or fraud upon the bankruptcy act, but for a present valuable consideration, and that said deed of trust was recorded according to law.

(b) Because as to 67e the evidence and proof and record in this case shows that R. Crawley Jones did not make or give said deed of trust to the said Dean with any intent or purpose on his part to hinder, delaw or defraud his creditors, or any of them; and that Dean accepted said deed of trust in good faith for a present fair consideration; and that there has been no actual fraud on the part of the said Jones in giving said deed of trust or on the part of the said Dean in accepting same.

6. The Circuit Court of Appeals erred in deciding and holding that the deed of trust from R. Crawley Jones and wife to E. C. Dean, Trustee, dated Sept. 3, 1909, and recorded in the Clerk's Office of the Circuit Court of Dinwiddie County, Va., was invalid under Sec. 60b, as an unlawful preference, and void under Sec. 67e of the Bankruptcy Acy, as a fraudulent preference.

(a) Because the question as to the deed of trust being an unlawful preference under 60b, having already been decided by the District Court in favor of Dean, and no cross-appeal having been taken therefrom by the appellees, that question was not before it and it was without authority to reverse the ruling of the District Court; and further because the bill and proofs in this case shows that he was not a creditor of Jones at the time the deed of trust was given him, and the indispensable pre-requisite of a preference being lacking, viz., a pre-existing creditor, there could have been no intent to prefer Dean, nor can said deed of trust, of which Dean was the beneficiary, be set aside under Sec. 60b of the Bankruptcy Act.

(177) (b) Because there is no allegation in the bill, nor in the proofs or record in this case that there was any actual fraud on the part of either Jones or Dean; nor is there any allegation in the bill that the deed of trust is one that should be held null and void as against creditors of the bankrupt under the laws of this state; nor is there any allegation in the bill that the deed of trust was given or accepted not in good faith or that the same was made in fraud of the bankruptcy act, nor did the special prayer to the bill seek relief upon these grounds or under Sec. 67e of the Bankruptcy Act. The relief prayed for was to have the deed of trust set aside under 60b as an unlawful preference; and further because the proof and record in this case fully shows that the deed of trust was given by Jones and accepted by Dean in good faith, for a present consideration, and was not made in contemplation of bankruptcy or fraud upon the bankruptcy act, and there was no actual fraud on the part of either Jones or Dean in said transaction.

7. The Circuit Court of Appeals erred in holding and deciding that "we are free therefore to consider whether the deed of Dean should be annulled as an unlawful prference under Sec. 60b, although the District Court held that it was not such a preference.

(a) Because the appellees failed to take a cross-appeal from that part of the decision of the District Court holding the deed of trust was valid under Sec. 60b and was not a preference, which ruling was adverse to the appellees, and therefore the question as to the deed of trust being annulled as an unnlawful preference under Sec. 60b not being properly before the Circuit Court of Appeals was without authority to consider same.

8. The Circuit Court of Appeals erred in affirming the District Court's finding that Dean had a reasonable cause to believe Jones insolvent, and in further holding and deciding that "The insolvency of R. Crawley Jones at the time of this transaction is admitted; and that it is difficult to imagine stronger reasons for Dean to believe him insolvent, short of having an accurate balance sheet of his assets and liabilities."

(a) Because the proof in this case shows that not a single witness testified that he believed Jones insolvent at the time of the making of the loan by Dean, nor is such admission shown by the record.

(b) Because the evidence and proof in this case shows that Dean did make before actually loaning the money every reasonable examination and inquiry into the affairs of the said Jones that he was called upon to make or would have been made by an ordinary prudent business man, and that as a result thereof he became satisfied that the said Jones was solvent and was only in need of some ready cash to tide him over his threat-
(178) ened embarrassment and that he would continue his business and farming; and further the uncontradicted testimony of Dean is that his main object in calling on the cashier of the bank was to learn of the financial condition of Jones and how he stood in that city, and as much as he would have liked to accommodate him he would not have loaned him the money but for the information he had received from the cashier of the bank that Jones stood as well as any young man in that community and that the merchants in Petersburg had a great deal of confidence in him, and that this was well shown by the unlimited credit they had given to him when he first started in business with a small capital, and as to his financial standing, he (the cashier) had been up to Jones places and investigated, and that it was his opinion that he (Jones) had plenty to pay everybody, and as he did not have that amount of money himself and in order to make the loan it was necessary for him to borrow the money, and he would not have borrowed the money to lend Jones except upon good security, and if he had thought for one moment he was not receiving good security, he would not have made the loan. But from the information he had received from the cashier of the bank, Jones father and the contents of Jones' letter to him, he was thoroughly convinced that Jones was in good financial standing.

(c) Because the testimony of Long, the cashier of the bank, at which Jones did his banking business, is that he did not know at the time that Jones was insolvent; and further because in the bill of complaint the trustee alleges and admits that the bank did not know or have a reasonable cause to believe at the time the

notes were paid that R. Crawley Jones was insolvent; and it further appears from the evidence and proof that the bank knew all about Jones' monetary condition, including the rumor that one of the signatures on the notes was not genuine-five of its directors being among Jones' largest mercantile creditors. If the banks did not have reasonable cause to believe Jones was insolvent the same is more true of Dean.

9. The Circuit Court of Appeals erred in holding and deciding that "The appeal in the letter to Dean of Sept. 1, signified acute financial distress, and was notice that Jones had exhausted his credit, and had comes to the end of his ability to obtain money in the ordinary course of business."

(a) Because all that letter indicated was fear of exposure, whether the same was deserved or not and an appreciation of the necessity of raising money at once to avoid such exposure. He expressly states he is worth five times the amount he wanted to borrow. Naturally he could give the explanation of why he wanted to borrow the sum only to near relatives equally interested with himself in avoiding the publicity of an exposure of the rumored forgery of one of the signatures to the notes.

(179) 10. The said Circuit Court of Appeals erred in holding and deciding that "But Dean has much more to overcome than mere knowledge that the money was lent to be used to pay an existing debt. Charged with notice of the insolvency of the debtor, his purpose was to extricate Jones from embarrassment by acting with and for him in preferring a pressing debt. In pursuance of this purpose, as agent for the debtor and in his behalf he actively participated in satisfying the pressing creditor, and taking up the pressing debt by means of the secured debt to himself. Even if the bank's notes had been marked paid, the whole transaction showed on its face that there was not that novation that the bankrupt statute contemplates as necessary to the protection of a lender. Looking away from the form to the substance, by his participation as agent of the insolvent debtor in

paying the bank and taking up the notes and securing the debt, Dean tied himself to the old debt, and the notes given to him must be regarded mere substitution of new papers for the old."

(a) Because the Court seems to have overlooked the conditions and agreement under which Dean advanced the money with which the father of the bankrupt took and paid the notes held by the banks. For the money so advanced by Dean was advanced under a contract or arrangement and whereby the debtor R. C. Jones had made and delivered to Dean, at the time he wrote the letter asking for the loan, four notes evidencing the money to be advanced and accompanied by a simultaneous agreement to execute a deed of trust to secure these four notes, which agreement was subsequently carried out.

(b) Because there is no allegation in the bill and there is no evidence or proof in the record in this case that Dean acted as or was the agent of Jones, the bankrupt, or that he participated as such for his benefit in carrying out the alleged plan of preference. It being a mere coincidence that Dean was present when the money he loaned the bankrupt was used by the bankrupt's father, in accordance Jones directions, in paying Jones' indebtedness at the bank. It would seem therefore that it is impossible that the transaction can be converted from that which it was into something which it was not, in order to bring in the doctrine of a preference under Sec. 60b of the Bankruptcy Act, of that of fraud under 67e of the Bankruptcy Act.

(180) 11. The Circuit Court of Appeals erred in holding and deciding (in the tenth paragraph of its opinion) that "The reason is still stronger for holding it invalid when the lender acts as the agent of the debtor with the distinct purpose of aiding him to prefer a particular for his (the bankrupt's) own benefit."

(a) Because there is no allegation in the bill, nor is there any evidence or proof in the record in this case, that Dean acted as or was the agent of Jones, or that he participated as such with the distinct purpose of aiding him to prefer a particular debt.

(b) Because such a holding is an erroneous conclusion of law, and of the facts in this cause.

12. The Circuit Court of Appeals erred in affirming the decree of the District Court, and in holding and deciding that "The mortgage is also obnoxious to condemnation under Sec. 67e, as held by the District Judge."

(a) Because there is no allegation in the bill or proof in this case of any actual fraud on either the part of Jones in giving the deed of trust or on the part of Dean in accepting the same, or that Jones not only intended to pay the notes held by the banks, but to defraud his other creditors.

(b) Because the payment by even a failing debtor of a legitimate debt, even though he thereby intends to create a preference, is not a fraud under the Bankruptcy Act, and does not come within the provisions of 67e or 70e of the Bankruptcy Act.

(c) Because there is no allegations or facts in the bill or proof in the record to the effect that Dean had any knowledge of Jones' intent to defraud his creditors.

(d) Because under the bankruptcy act the fact that the mortgagor was insolvent at the time the mortgage is given, and that the mortgagee knew it, does not effect the validity of a mortgage given in good faith and for a present consideration.

(e) Because the fact that the execution of the deed of trust was immediately followed by a delivery of possession of the property, so far from being a badge of fraud, has rather a contrary tendency, and was resorted to to avoid an implication of fraud from the retention of possession by the mortgagor; and further because under the law a prompt and vigorous enforcement of an honest debt is by no means indicative of fraud.

(f) Because the mere fact that one creditor was preferred over another, or that the deed of trust might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid the deed of trust as a fraudulent conveyance, for (181) it has been uniformly held that acting in good faith a debtor might thus prefer one or more creditors.

(g) Because the loaning of the $1,600 by Dean to Jones and the taking of the deed of trust as a security for said loan, was only an exchange of securities, and the giving of the same did not diminish the estate of the said Jones; and further because the bill of complaint nowhere alleges nor is there any proof in the case that Dean had any relation or connection with said creditors, the banks, who got the money he loaned, or that he was in any way their representative, or that there was any collusion or any conspiracy between the banks and Dean, whereby that was done indirectly which is prohibited by the bankrupt act from being done directly.

(182) (13. The Circuit Court of Appeals erred in affirming the holding of the District Court that it appeared that R. Crawley Jones was insolvent both on the 1st ray of September, 1909, and thereafter.

(a) Because there is no proof in the record in this case of the alleged insolvency of the said R. Crawley Jones at any date prior to the filing of the petition to adjudicate him a bankrupt on Dec. 24, 1909, at which date the decision of the Circuit Court of appeals held him to have been insolvent.

14. The Circuit Court of Appeals erred in affirming the holding of the District Court that R. Crawley Jones on the 1st day of September, 1909, knew that he was insolvent.

(a) Because there is no proof in the record in this case of such knowledge.

15. The Circuit Court of Appeals erred in affirming the holding of the District Court that the investigation made by the said Claude M. Dean of the affairs of R. Crawley Jones was not such an investigation as would be a sufficient compliance with the requirements of the bankruptcy law.

(a) Because the record and proofs in this case show that the said Dean did actually make before loaning the money every reasonable examination and inquiry into the affairs of the said Jones that he was called upon to

make or would have been made by the ordinary prudent business man, and that as a result thereof he became satisfied that the said Jones was solvent and was only in need of some ready cash to tide him over his threatened embarrassment and that he would then continue his business and farming.

16. The Circuit Court of Appeals erred in affirming the holding of the District Court that Claude M. Dean consented to furnish the money because he desired to rescuse the said R. Crawley Jones from the disgraceful exposure which threatened him.

(a) Because the uncontradicted evidence in this case is that Dean would not have loaned said money had he not by the previous investigation he had made become satisfied that the security for the said loan was good and that the said R. Crawley Jones was not insolvent, as in order to make the loan it was necessary for him to borrow the money.

17. The Circuit Court of Appeals erred in affirming the holding of the District Court that the said Claude M. (183) Dean had a reasonable cause to believe that R. Crawley Jones was at the time he agreed to loan him the money insolvent, and that by a reasonable examination of the affairs of the said Jones, if such an examination had been made at the time, he would have been able to ascertain that the said Jones was in fact then insolvent.

(a) Because such a holding is contrary to the proof in the case, and the proof shows that Dean did make a reasonable examination of the affairs of the said Jones, and as result thereof he believed him to be solvent.

18. The Circuit Court of Appeals erred in affirming the holding of the District Court that nothing would be left the other creditors after paying in full the notes secured by the deed of trust.

(a) Because, if, as now claimed by the trustee in bankruptcy of R. Crawley Jones, that said Jones was in-

solvent at the time the notes at the bank were paid, and that the banks knew or should have known by exercise of due diligence and investigation that he, the said Jones, was insolvent since, in that event, the banks being existing creditors, the payment of their debts amounting to about $2,500 was a preference, and being within the four months said sum could have been recovered from said existing creditors, the banks, and the said $2,500 applied to the payment of the general creditors.

19. The Circuit Court of Appeals erred in affirming the holding of the District Court that Dean must be presumed to have been aware that the result of the payment of these notes and the taking of security for the money advanced by him was for the purpose of retirement of certain unsecured notes upon which his brother-in-law was liable for criminal prosecution, and the substitution therefor of another debt to him, for the payment of which all of his brother-in-law's property was mortgaged.

(a) Because the uncontradicted evidence shows that Dean was not willing or able to loan said money to enable his brother-in-law to avoid the publicity of such charge, and he would not have loaned the money if he had not after making diligent inquiry been assured of the solvency of the said R. Crawley Jones.

(184) 20. The Circuit Court of Appeals erred in affirming the holding of the District Court as a conclusion of law that when Dean accepted said mortgage he must be presumed, under the facts in this case, to have known that it was made in contemplation of the provisions of the Bankrupt Act, and with a view to accomplish something that was forbidden by such statute, viz., the substitution of a secured debt for an unsecured debt, which it was desired to pay in full so as to avoid criminal prosecution.

(a) Because such a holding is contrary to the law and the facts in this case.

(b) Because too much stress has been laid upon the letter Dean received from Jones relative to his being

charged with an offense, while the proof in the case only shows that there was a mere rumor that one of the endorsements on the notes was not genuine; that the money raised on the alleged forged notes, as far as this record shows, was used in the business of the said Jones, and hence was a valid debt.

(c) Because such a holding converts the transaction from that which it was into something which it was not, in order to sustain the presumption that it was made in contemplation of the provisions of the bankrupt act.

(d) Because a mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, cannot be held to be in itself a fraud or an act of bankruptcy.

(e) Because under the bill in this case and the proof and facts in the record, it would be an extravagant extension of the doctrine of fraud on the bankruptcy law to hold that such a deed of trust under the circumstances of this case, is of itself a fraudulent act.

21. The Circuit Court of Appeals erred in affirming the holding of the District Court that the deed of trust or mortgage in this case was made in contemplation of the provisions of the Bankrupt Act, and with intention to defeat same, since the effect thereof was to give a preference to the holders of the mortgage in contravention of the prohibition of the Bankruptcy Act.

(a) Because the said District Court having in its previous decision of July 25, 1912, held that on Sept. 3, 1909, Claude M. Dean was not a creditor of R. Crawley Jones, and that the giving of the deed of trust of Sept. 3, 1909, was not a preference, since the said Dean was not a pre-existing creditor, but was a mortgage given for a present actual valuable consideration.

(b) Because said holding is contrary to the law and evidence in this case.

(185) 22. The Circuit Court of Appeals erred in affirming the decree of the District Court holding the deed of trust from R. Crawley Jones and wife to E. C. Dean, Trustee, dated Sept. 3, 1909, and recorded in the Clerk's

Office of the Circuit Court of Dinwiddie County, Virginia, on the 11th day of Sept. 1909, invalid under the provisions of the Bankruptcy Act and in setting it aside, vacating and declaring it null and void; and it erred in further affirming the decree of the District Court adjudging the said W. P. Wells, the substituted trustee, to pay over to the complainant the sum of $1,634, with any interest thereon that may have been accrued whilst the same was in his hands as representing the net proceeds of the property embraced in the said deed of trust to be administered and disbursed as part of the bankrupt estate free of any lien thereon by reason of said deed of trust hereinbefore vacated.

(a) Because said decree is not supported by the allegations of the bill of complaint or the evidence or proof in the record in this case and because said decree is contrary to law.

(186) Wherefore, the said Claude M. Dean, appellant, prays that for the errors aforesaid, and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the appellant, the said decree of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the District Court of the United States for the Eastern District of Virginia, at Richmond, with instructions to dismiss the bill of complaint at the costs of the complainant, or for such further proceedings in said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises.

CLAUDE M. DEAN.

By WYNDHAM R. MEREDITH,
Counsel for Appellant.

(187) AFFIDAVIT AS TO AMOUNT INVOLVED IN CONTROVERSY, &C.

Filed Jan. 27, 1915.

SUPREME COURT OF THE UNITED STATES.

Claude M. Dean, Appellant,
vs.
R. Beale Davis, Jr., Trustee in Bankruptcy of R. Crawley Jones, Bankrupt, et al., Appellees.

UNITED STATES OF AMERICA, SS:
Eastern District of Virginia.

I, Claude M. Dean, the above named appellant, being duly sworn, on his oath says, that he is the appellant in the above entitled cause and that he is personally acquainted with the amount involved in this controversy; that said controversy is one arising in the bankruptcy proceedings against R. Crawley Jones; that the said R. Crawley Jones was adjudicated by the District Court of the United States for the Eastern District of Virginia a bankrupt on April 25, 1910; that the said R. Crawley Jones appealed from the order of the said District Court adjudicating him a bankrupt to the United States Circuit Court of Appeals for the Fourth Circuit, and the said Circuit Court of Appeals on December 21, 1910, affirmed the order of adjudication holding "that at the time of the filing of the petition he was insolvent, and that being so insolvent he did prefer certain of his creditors who then held his notes, which had been theretofore executed for value by him and were then held by the banks of Petersburg, Virginia, as was shown by the testimony submitted to said Court"; that on April 12, 1911, R. Beale Davis, Jr., was appointed trustee of the estate of the said R. Crawley Jones, Bankrupt; that on March 5, 1912, the said R. Beale Davis, Jr., as trustee in bankruptcy of the estate of R. Crawley Jones, Bank-
(188) rupt, filed a plenary suit in the District Court of the United States for the Eastern District of Virginia, at Richmond, against William P. Wells, Trustee, substituted in the place and stead of E. C. Dean, the trustee named in a certain deed of trust executed by R. Crawley Jones and Marie E. Jones, his wife, dated September 3,

1909, and your deponent, Claude M. Dean, the beneficiary under said deed of trust, for the purpose of having the said deed of trust set aside and declared void, as having been made by the said R. Crawley Jones with intent to prefer the said Claude M. Dean over his other creditors of the same class; that the said District Court refused to set aside and declare void the said deed of trust as a preference under section 60b of the bankruptcy act, but held the deed invalid and void under section 67e of the bankruptcy act; that your affiant took an appeal under section 24a of the bankruptcy act to the Circuit Court of Appeals from said decision of the said District Court holding the deed invalid and void under section 67e, but that the said trustee in bankruptcy did not take a cross-appeal from the decision of the District Court holding the said deed of trust invalid under section 67e of the bankruptcy act; that the said Circuit Court of Appeals on said appeal of your deponent held that the said deed of trust was invalid and void under both section 60b and section 67e of the bankruptcy act; that this cause is a controversy arising in bankruptcy proceedings over which the Circuit Court of Appeals, under section 24a of the bankruptcy act, exercised appellate jurisdiction as in other cases, and that its decision is not final and that this is a proper controversy in bankruptcy proceedings (189) to be reviewed by the Supreme Court on an appeal; and that the matter in controversy in said suit exceeds one thousand dollars, besides costs and interest.

CLAUDE M. DEAN.

Subscribed and sworn to before me this 25th day of January, 1915.

R. E. POWERS,
Deputy Clerk U. S. District Court.

(Seal of District Court)

(Revenue Stamp Cancelled)

(190) **ORDER ALLOWING APPEAL.**

Filed Jan. 27, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

Claude M. Dean, Appellant,
vs.
R. Beale Davis, Jr., Trustee in Bankruptcy of the Estate of R. Crawley Jones, Bankrupt, and W. P. Wells, Substituted Trustee, Appellees.

IT IS HEREBY ORDERED that the appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed, to operate as a supersedeas. The bond being fixed at Two hundred and fifty dollars as the sum in controversy is now on deposit by the direction of the Court to its credit and not subject to be removed without an appropriate order.

EDWARD D. WHITE,
Chief Justice of the United States.

Jan. 27th, 1915.

(191) **APPEAL BOND.**

Filed Jan. 27, 1915.

KNOW ALL MEN BY THESE PRESENTS, That we, Claude M. Dean, ..., ..., as principal, and the National Surety Company....., ..., as surety, are held and firmly bound unto R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, and W. P. Wells, substituted trustee..... .... in the full and just sum of Two hundred and fifty..... .....Dollars, to be paid to the said R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, and W. P. Wells, substituted trustee .... certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators,

jointly and severally, by these presents. Sealed with our seals and dated this.....26th.....day of January, in the year of our Lord one thousand nine hundred and fifteen.

WHEREAS, lately at a United States Circuit Court of Appeals for the Fourth Circuit..... in a suit depending in said Court, between Claude M. Dean, Appellant, and R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., Appellees .....
....
....
....
a decree.....was rendered against the said Claude M. Dean, Appellant.....
....
and the said Claude M. Dean, Appellant.....
....
....
having obtained an appeal.....and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree.....in the aforesaid suit, and a citation directed to the said R. Beale Davis, Jr., Trustee in Bankruptcy of the estate of R. Crawley Jones, bankrupt, and W. P. Wells, trustee .....
..... citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Claude M. Dean, Appellant, ...
..... shall prosecute said appeal.....to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of
R. M. F. Williams, Jr.

CLAUDE M. DEAN. (Seal)

NATIONAL SURETY COMPANY. (Seal)

By ARTHUR M. CANNON, (Seal)
Attorney in Fact.

(Seal of Surety Co.)

Approved by—
Edward D. White,
Chief Justice of the United States.

Jany. 27th, 1915.

(192) **CITATION.**

Issued Jan. 27, 1915.

UNITED STATES OF AMERICA, SS:

To R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, and W. P. Wells, Trustee:

GREETING:

Your are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit, wherein Claude M. Dean is Appellant and you are Appellees, to show cause, if any there be, why the decree rendered against the said Appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 27th day of January, in the year of our Lord one thousand nine hundred and fifteen.

EDWARD D. WHITE,
Chief Justice of the United States.

SERVICE OF CITATION.

Executed this 8th day of February, 1915, by delivering a true copy of the within Citation to R. Bartlett Roper, Jr., counsel of record for R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones,

bankrupt, in person in the City of Richmond, Virginia, a place within the Eastern District of Virginia.

JOHN G. SAUNDERS,
U. S. Marshall for Eastern District of Virginia.

By RIVES B. HARDY,
Chief Deputy U. S. Marshal for Eastern District of Virginia.

Marshal's Fee
$2.00 (Paid).

ACCEPTANCE OF SERVICE OF CITATION BY W. P. WELLS, SUBSTITUTED TRUSTEE.

"Legal service of the above citation admitted this 11th of February, 1915.

W. P. WELLS,
Substituted Trustee."

(193) **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA, ss:
Fourth Circuit.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and poceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 23rd day of February, A. D., 1915.

(Seal of Court)

HENRY T. MELONEY, Clerk
U. S. Circuit Court of Appeals,
Fourth Circuit.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 833.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE ESTATE R. CRAWLEY JONES, BANKRUPT, APPELLEE.

NOTICE OF APPELLEE'S MOTION TO DISMISS APPEAL ALLOWED IN THIS CASE.

The appellant is hereby notified that the appellee, R. Beale Davis, Jr., Trustee, will on Monday, the 17th day of May, 1915, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the brief in support thereof are herewith delivered to you) to the

Supreme Court of the United States at its court-room in the city of Washington, D. C.

RICHARD B. DAVIS and
BARTLETT ROPER, JR.,
Counsel for R. Beale Davis, Jr., Trustee, Appellee.

I hereby certify that on the 19th day of April, 1915, I delivered to C. V. Meredith, Esqr., counsel for Claude M. Dean, appellant, a copy of the above notice and a copy of the motion and brief therein referred to.

BARTLETT ROPER, JR.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 833.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE ESTATE R. CRAWLEY JONES, BANKRUPT, APPELLEE.

MOTION OF APPELLEE TO DISMISS APPEAL ALLOWED IN THIS CASE.

Now comes R. Beale Davis, Jr., trustee of the estate of R. Crawley Jones, bankrupt, appellee, by Richard B. Davis and Bartlett Roper, Jr., his counsel, and moves this honorable court to dismiss the appeal heretofore allowed by it in this cause for the following reasons:

Claude M. Dean, the appellant herein, is the same Claude M. Dean who was, on November 16, 1914, by this honorable court denied a writ of *certiorari* in this suit. The purpose of this suit is to have declared invalid and of no force and effect a lien claimed by said appellant on the proceeds of the sale of certain property formerly belonging to one R. Crawley Jones. The lien claimed by said appellant was by virtue of a certain deed of trust made by the said R. Crawley Jones to secure notes held by appellant. The said Jones was duly adjudged a bankrupt and this suit was instituted and both the District Court and the Circuit Court of Appeals below decided that the deed of trust was invalid and the lien claimed by appellant of no force and effect. As above stated a writ of *certiorari* was denied by this honorable court.

After this writ of *certiorari* was denied and after the mandate of the said Circuit Court of Appeals had issued, and before this appeal was allowed, the said Claude M. Dean, appellant here, voluntarily appeared before the United States District Court for the Eastern District of Virginia and filed and had the court allow as an unsecured claim against the estate of R. Crawley Jones, bankrupt, the claim which he now, by this appeal, seeks to have declared a secured claim.

Appellee maintains that the above stated action of said appellant, and other action taken by him before said United States District Court for the Eastern District of Virginia, in said matter of R. Crawley Jones, bankrupt, as is more fully set out in a brief filed with this motion, amount to a waiver and abandonment by appellant of the claim which by this appeal he seeks to maintain, and are only to be understood as a solemn admission by appellant of the soundness and correctness of the decree here appealed from.

Appellee therefore respectfully submits that this appeal, presenting as it does only the question of the validity of a lien claimed by appellant, the invalidity of which he, him-

self, has, before a court of competent jurisdiction, solemnly admitted, presents only a moot question, and one which appellant should not be allowed to present, and appellee therefore submits that this appeal should be dismissed.

R. BEALE DAVIS, JR., TRUSTEE, APPELLEE,
By RICHARD B. DAVIS and BARTLETT ROPER, JR.,
His Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 833.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, APPELLEE.

BRIEF OF APPELLEE IN SUPPORT OF HIS MOTION TO DISMISS THE APPEAL ALLOWED IN THIS CASE.

The question involved in this appeal is as to the validity of a certain deed of trust made by one R. Crawley Jones dated September 3rd, 1909, and conveying practically all of his property to secure his four negotiable notes, aggregating $1,600.00 given to and held by appellant herein.

Certain creditors of the said R. Crawley Jones, filed proceedings in involuntary bankruptcy against the said R. Crawley Jones and he was on the 25th day of April, 1910, duly adjudged a bankrupt by the District Court of the United States for the Eastern District of Virginia. This adjudication was affirmed by the United States Circuit Court of Appeals for the Fourth Circuit.

In the meantime by agreement the property covered by the said deed of trust had been sold and the proceeds of sale were deposited in the National State and City Bank, Richmond, Virginia to await the determination of the validity of the lien thereon claimed by appellant, the holder of the notes secured by said deed of trust.

Appellee was duly appointed trustee of the estate of said R. Crawley Jones, bankrupt, and on the 5th day of March, 1912, instituted this suit for the purpose of having declared invalid the lien claimed by appellant by virtue of said deed of trust on the proceeds of the sale of the property of said bankrupt. By decree entered by the District Court of the United States for the Eastern District of Virginia on the 14th day of April, 1913, the lien claimed by said appellant was declared invalid and of no force and effect. On appeal, the United States Circuit Court of Appeals for the Fourth Circuit affirmed this decree. Application was then made to this court for a writ of *certiorari* and the same was denied.

After the writ of *certiorari* had been denied and after the mandate of the Court of Appeals had issued, the said Claude M. Dean, the appellant herein, (his claim to a lien on the proceeds of sale of the property of R. Crawley Jones, bankrupt having been determined adversely to him), voluntarily appeared before the District Court of the United States for the Eastern District of Virginia in the matter of R. Crawley Jones, bankrupt, and consented to the entry of a decree filing and allowing as an unsecured claim against the estate of said bankrupt, his claim based on the

notes described in and secured by the above mentioned deed of trust which had been adjudged to be invalid.

On December 19th, 1914, another decree was entered by the said District Court in the matter of R. Crawley Jones, bankrupt, making allowances to counsel for appellee out of the fund arising from the sale of property under said deed of trust by virtue of which the said appellant claimed a lien, and directing the referee in bankruptcy to formulate and report to court a scheme of distribution of said fund among the creditors of said bankrupt. This decree was also entered with the full knowledge and consent of the appellant herein, and the allowance made to counsel was paid on December 22, 1914, and the report of the referee was filed on January 20, 1915. In this report the claim of appellant is duly reported as an unsecured claim against the estate of said bankrupt.

After the said appellant had taken the action as above set out and after the said decrees had been entered in said bankruptcy matter, the appellant herein, with full knowledge of the facts hereinbefore set out, made application to this honorable court for an appeal from the decree of the United States Circuit Court of Appeals for the Fourth Circuit in this cause.

The above statements of fact in this brief are supported by an affidavit of Bartlett Roper, Jr., and by certified copies of the decrees entered by said District Court, filed herewith as a part hereof and it is not believed that the said statements will be denied by appellant. If they are denied, it is respectfully requested that a statement of facts with regard to this matter be obtained from the Honorable Edmund Waddill, Jr., judge of the United States District Court for the Eastern District of Virginia, before whom the said appellant appeared and in whose court the matter of R. Crawley Jones, bankrupt, is pending.

It is respectfully submitted that Claude M. Dean, appellant herein, having voluntarily and in a court of compe-

tent jurisdiction admitted the invalidity of the lien now claimed by him, after its invalidity had been established by a decree of the United States Circuit Court of Appeals for the Fourth Circuit, and after a writ of *certiorari* had been denied him by this honorable court and having consented to a distribution of the fund on which he theretofore claimed a lien, and filed his claim as an unsecured creditor, should not now, in this appeal, be allowed to take a position and make a contention directly opposed to his own voluntary action and admission, and that he is, and should be, estopped to prosecute this appeal, and that the question here presented is, by the voluntary action and admission of the said appellant, made only a moot question.

Wherefore it is respectfully submitted that the appeal granted to the said Claude M. Dean should be dismissed.

RICHARD B. DAVIS and BARTLETT ROPER, JR.,
Counsel for Appellee.

AFFIDAVIT OF BARTLETT ROPER, JR.

EASTERN DISTRICT OF VIRGINIA,
CITY OF PETERSBURG,—TO-WIT:

Before me, John S. Tynes, a notary public, in and for the city of Petersburg, in the Eastern District of Virginia, personally appeared this day Bartlett Roper, Jr., who being first duly sworn, deposes and says as follows:

On the 27th day of November, 1914, after the petition of Claude M. Dean for a writ of *certiorari* to the U. S. Circuit Court of Appeals for the Fourth Circuit in that certain equity cause styled "*Claude M. Dean, appellant,* v. *R. Beale Davis, Jr., trustee, appellee,*" had been denied by the Supreme Court of the United States, to-wit: On November 16, 1914, and after the mandate of the said Circuit Court of Appeals in said equity cause had issued, to-wit: On November 24th, 1914, this affiant, as attorney for the said R. Beale Davis, Jr., Trustee of the estate of R. Crawley Jones, bankrupt, appellee in said equity case, presented to the Honorable Edmund Waddill, Jr., judge of the District Court of the United States, for the Eastern District of Virginia, at Richmond, Virginia, a draft of a decree to be entered in the matter of R. Crawley Jones, bankrupt, pending in said District Court, directing the transfer by Joseph P. Brady, clerk of said court, of the sum of $1,634.00 from the National State and City Bank, Richmond, Virginia, to the Planters National Bank, of said city, the designated depository of the said court for bankruptcy funds. As directed by a former decree entered in said matter of R. Crawley Jones, bankrupt, the said sum of $1,634.00 had been deposited in said National State and City Bank to await the decision of the United States Courts as to the validity of a certain deed of trust executed by the said R. Crawley Jones, bankrupt, securing the payment of certain

notes of said bankrupt held by the said Claude M. Dean aggregating the sum of $1,600.00 and interest—the net sum of $1,634.00 having been realized from the sale of the property under said deed of trust and the said equity suit styled, *"R. Beale Davis, Jr., trustee, complainant,* v. *Claude M. Dean, defendant,"* having been instituted for the purpose of testing the validity of said deed of trust.

The said Claude M. Dean objected to the entry of said decree directing the transfer of said sum of $1,634.00 unless there was inserted therein a clause filing and allowing his said claim of $1,600.00 and interest as an unsecured claim against the estate of said R. Crawley Jones, bankrupt, insisting that he had a right to file his claim and have the court allow same as an unsecured claim against the estate of said bankrupt and thereby save him the trouble and expense of having to appear before the referee at Petersburg, Virginia.

On December 4th, 1914, the said Claude M. Dean and this affiant, as attorney for said R. Beale Davis, Jr., trustee, personally appeared before the Honorable Edmund Waddill, Jr., judge of said court, at his office in the city of Richmond, Virginia, and after due consideration of the matter it was then and there distinctly understood and agreed by and between the said Claude M. Dean and this affiant, that, if James M. Quick, Jr., attorney-at-law, of Petersburg, Virginia, who represented R. E. Blakey, a large creditor of said bankrupt, had no objection, a clause, such as wished by the said Claude M. Dean, filing and allowing his claim as an unsecured claim against the estate of said bankrupt, would be inserted in the draft of said decree and the decree entered accordingly. This affiant, at the request of the court, saw the said James M. Quick, Jr. on his return to the city of Petersburg, and notified the court, that the said James M. Quick, Jr., had no objection to the insertion in said draft of decree of a clause such as wished by the said Claude M. Dean, filing and allowing his

claim as an unsecured claim against the estate of said bankrupt, and the said decree was accordingly entered by said court as of November 27th, 1914. As directed by said decree, the said sum of $1,634.00 was duly withdrawn from the said National State and City Bank and placed on deposit in the said Planters National Bank, the designated depository of the said court for bankruptcy funds. A certified copy of said decree is hereto attached, marked "A," as a part of this affidavit.

On the 19th day of December, 1914, another decree was entered by said court in the said matter of R. Crawley Jones, bankrupt, making certain allowances, out of the said fund of $1,634.00, to this affiant, as attorney for certain petitioning creditors as well as counsel for the said R. Beale Davis, Jr., trustee in said equity cause styled *"R. Beale Davis, Jr., trustee,* v. *Claude M. Dean,"* and directing that B. C. Syme, Esq., referee in bankruptcy, at Petersburg, Virginia, formulate and report to court a scheme of distribution of the fund remaining in said Planters National Bank to the credit of the court in said matter. This decree was entered by the court with the full knowledge and consent of the said Claude M. Dean. On December 22, 1914, this affiant was paid out of said fund the amount of the allowances made him by said decree. A certified copy of said decree is hereto attached, marked "B," as a part of this affidavit.

The said referee in bankruptcy, acting under said order of reference contained in said decree, completed his report, and on the 20th day of January, 1915, the same was filed in the clerk's office of said District Court. In said report the claim of the said Claude M. Dean is duly reported as an unsecured claim against the estate of said bankrupt.

After the above two decrees had been entered in the said matter of R. Crawley Jones, bankrupt, with the full knowledge and consent of the said Claude M. Dean, the said

Claude M. Dean made application to the Supreme Court of the United States for an appeal from the decree entered by the United States Circuit Court of Appeals for the Fourth Circuit in the said equity cause styled *"Claude M. Dean, appellant,* v. *R. Beale Davis, Jr., trustee, appellee,"* invalidating and declaring null and void the said lien claimed by him on said fund of $1,634.00 and on the 27th day of January, 1915, more than a month after the above two decrees had been entered in the said bankruptcy matter, was allowed an appeal by one of the justices of the United States Supreme Court.

The said Claude M. Dean knows that the facts as above set out are true and he cannot deny the same.

BARTLETT ROPER, JR.

Sworn to before me, and subscribed in my presence, this 15th day of April, A. D. 1915.

(Seal) JNO. S. TYNES,
Notary Public for City of Petersburg, Va.

(10c in U. S. Internal Revenue Documentary Stamps attached to original.)

COPY DECREE NOV. 27, 1914.

"A."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

In the matter of
R. CRAWLEY JONES,
Bankrupt. } IN BANKRUPTCY.

It appearing to the court that, as directed by a decree entered in the above matter on December 6, 1911, W. P. Wells, substituted trustee, on February 21st, 1912, deposited in the National State and City Bank, Richmond, Virginia, to the credit of the court in this cause the sum of $1,634, and filed the certificate of said bank with Joseph P. Brady, clerk of this court, the said certificate being numbered 7822; and it further appearing to the court from said decree of December 6th, 1911, that the said certificate of said bank should be held by the said Joseph P. Brady, clerk, to await the decision of the United States Courts as to the validity of a certain deed of trust executed by said bankrupt and his wife to E. C. Dean, trustee, dated September 3rd, 1909; and it further appearing to the court that on the 14th day of April, 1913, a decree was entered in that certain suit in equity depending in this court styled *"R. Beale Davis, Jr., trustee,* v. *Claude M. Dean, et als,"* invalidating and declaring null and void the said deed of trust of September 3rd, 1909, executed by said bankrupt and his wife, which said decree has been affirmed by the United States Circuit Court of Appeals, Fourth Circuit, as appears from the mandate of said court filed in said equity cause on November 24th, 1914; and it further appearing to the court that the said sum of $1,634, should now be

deposited to the credit of this court in the above mentioned bankruptcy matter in the Planters National Bank, Richmond, Va., the designated depository for bankruptcy funds.

It is, therefore, ordered, that Joseph P. Brady, clerk of this court, draw his check upon the fund so to the credit of this court in the National State and City Bank, Richmond, Virginia, for the sum of $1,634.00, payable to the order of himself as clerk, which said check shall be countersigned by the judge of this court. Thereupon the said Joseph P. Brady, clerk as aforesaid, shall deposit said sum of $1,634, in the Planters National Bank, Richmond, Va., to the credit of the court in the above mentioned matter and file the certificate of said bank among the papers in this cause. This decree is entered without prejudice to the rights of the said Claude M. Dean for his claim of $1,600.00 as a general creditor, which is hereby allowed as an unsecured debt.

EDMUND WADDILL, JR.,
U. S. Judge.

Richmond, Va., 27th November, 1914.

A true copy—Attest:

(Seal) JOSEPH P. BRADY, Clerk.

COPY DECREE DEC. 19, 1914

"B."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

In the matter of
R. CRAWLEY JONES,
Bankrupt. } IN BANKRUPTCY.

On motion of the attorney for the petitioning creditors in the above mentioned matter, as well as of counsel for the trustee in bankruptcy in the equity cause, styled *"R. Beale Davis, Jr., trustee,* v. *Claude M. Dean, et als,"* lately depending in this court, to be allowed out of the fund to the credit of the court in this cause a reasonable compensation for his services as such, the court is of opinion that the sum of $150.00 should be allowed the attorney for the petitioning creditors and that the sum of $250.00 should be allowed the counsel for the trustee in bankruptcy in the above mentioned equity cause as a reasonable compensation for his services in said respective matters.

It is, therefore, ordered that Joseph P. Brady, clerk of this court, draw his check upon the fund to the credit of the court in this matter in the Planters National Bank, of the city of Richmond, Virginia, in favor of Bartlett Roper, Jr., attorney for the petitioning creditors, for the sum of $150.00, and said clerk will likewise draw his check on said fund so to the credit of this court in favor of Bartlett Roper, Jr., attorney for the trustee in bankruptcy in the equity cause aforesaid, for the sum of $250.00, which said two checks shall be countersigned by Thomas B. Snead, referee in bankruptcy.

It is further ordered that B. C. Syme, referee in bankruptcy, formulate and report to court a scheme of distribution of the fund remaining in bank to the credit of the court in this cause.

EDMUND WADDILL, JR.,
U. S. District Judge.

Richmond, Va., Dec. 19, 1914.

A true copy—Attest:

(Seal) JOSEPH P. BRADY, Clerk.

FILED
MAY 15 1915
JAMES D. MAHER

IN THE

Supreme Court of the United States.

October Term, 1914.

No. [redacted] 70

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, ET AL., APPELLEES.

ANSWER AND BRIEF OF APPELLANT ON MOTION OF APPELLEES TO DISMISS APPEAL.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

WYNDHAM R. MEREDITH and
C. V. MEREDITH,
Counsel for Appellant.

Supreme Court of the United States.

October Term, 1914.

No. 833.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, ET AL., APPELLEES.

ANSWER AND BRIEF OF APPELLANT ON MOTION OF APPELLEES TO DISMISS APPEAL.

Before answering the particular positions taken by Appellees in their motion to dismiss the appeal in the above styled cause, appellant respectfully submits that said motion cannot be entertained by this Honorable Court, because its decision involves the consideration of the records in two cases, or at least indispensable parts thereof, which do not accompany the motion. The first case is that entitled, *In the matter of R. Crawley Jones, bankrupt,* and the second case is that of *Claude M. Dean, appellant,* vs. *R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt, et al., appellees.* The motion to dismiss this latter suit is not accompanied by the record or any part thereof. Nor has the record or the indispensable parts of the record in the case entitled, *In the matter of R. Crawley Jones, bankrupt,* been printed or filed with said motion. This

we understand to be necessary before this court will consider the motion to dismiss.

Among the indispensable papers in this case not printed and filed with the motion to dismiss is a certain agreement, to be hereafter more particularly referred to, between Bartlett Roper, Jr., counsel of record for the creditors of the bankrupt, R. Crawley Jones, and the appellant, Claude M. Dean, by which it was agreed that the property and goods covered by a certain deed of trust to secure the appellant, Claude M. Dean, should be sold and the money held "*to await the decision of the U. S. Courts as to the validity of such deed of trust.*"

Among the indispensable papers belonging to the record in the case entitled, *In the matter of R. Crawley Jones, bankrupt,* is a letter of the District Judge for the Eastern District of Virginia, Hon. Edmund Waddill, addressed to Bartlett Roper, Jr., and the appellant, Claude M. Dean, dated Feb. 10, 1915, declining to pay out the money obtained from the sale of the property and goods secured by said deed of trust in said *bankruptcy proceedings* in view of the order entered by Mr. Chief Justice White allowing a supersedeas in the suit of *Claude M. Dean, appellant,* vs. *R. Beale Davis, Jr., Trustee in bankruptcy of the estate of R. Crawley Jones, bankrupt.*

II.

The motion to dismiss is not based on the ground that the appeal was not properly granted. It is admitted that it was taken within the year from the date of the final decree of the U. S. Circuit Court of Appeals; that the cause is a controversy arising in a bankruptcy proceeding; that the matter in controversy in said suit exceeds one thousand dollars, viz., sixteen hundred and thirty-two dollars; that the jurisdiction of the District Court and that of the Circuit Court of Appeals is or was dependent in no wise upon the opposite parties

to the suit or controversy being aliens and citizens of the United States, or citizens of the different States; that this case does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper cause to be reviewed by the Supreme Court on an appeal.

III.

IT IS SOUGHT TO DISMISS THIS APPEAL:

First. Because the appellant has been refused a writ of *certiorari* by this Court. This is true, but this was because *certiorari* was not the proper remedy by which to have the cause reviewed. Such decision, however, does not effect our right to an appeal, which is the proper remedy. It very often happens, as this Honorable Court well knows, that in the many changes that have taken place in the law governing the method of bringing up suits to this Court, counsel are frequently uncertain as to the proper procedure for having their cases reviewed, and therefore resort to both *certiorari* and appeal. So much for the claim that because this Court held *certiorari* not to be the proper remedy that therefore our appeal should be dismissed.

IV.

Second. The next ground on which it is sought to dismiss this appeal, is that it presents only a moot question. This appeal is allowed in an independent or plenary suit brought by the Trustee in bankruptcy of R. Crawley Jones, bankrupt, against your appellant, the beneficiary under a certain deed of trust, made by the bankrupt to secure a cash loan of $1,600, for the purpose of having said deed of trust declared invalid as a preference. After this appeal was allowed, the United States District Judge for the Eastern District of Virginia, Hon. Edmund Waddill, Jr., refused in the cause entitled, *In the matter of R. Crawley Jones, bankrupt,*

to distribute the fund created by the sale of the property and goods covered by said deed of trust, as will be seen from the following letter:

"OFFICE UNITED STATES DISTRICT JUDGE,
EASTERN DISTRICT OF VIRGINIA.

"Edmund Waddill, Jr.

"Richmond, February 10th, 1915.

"Messrs. Bartlett Roper, Jr., and Claud M. Dean,
"Petersburg and Richmond, Va.

"Gentlemen:

"Referring to our interview of yesterday, in reference to the R. Crawley Jones matter, I beg to say that my judgment is that I should not pay the money out in the bankruptcy proceedings, in view of the order entered by Mr. Justice White allowing a supersedeas in the suit filed to set aside the trust deed, executed by the bankrupt on the eve of his bankruptcy.

"In this connection, I beg to suggest the desirability of arranging to have the fund deposited at interest, instead of lying in the usual way of deposits, under the circumstances here.

"Yours truly,

"EDMUND WADDILL, JR.,
"United States Judge."

(The original of this letter is filed with this answer.)

This letter shows that far from the matter being a moot question, the fund is now held by the District Court in the bankruptcy proceedings, to be finally distributed in accordance with the decision of this Honorable Court in this independent suit brought by the Trustee in bankruptcy of R. Crawley Jones, bankrupt, against your appellant.

V.

Third. The next ground on which the motion to dismiss is based, is the claim that the appellant, Claude M. Dean, has released and disclaimed any right as a lien creditor of the bankrupt, R. Crawley Jones, and has given up all his rights under the aforesaid deed of trust, in which he is the benficiary, and is now only claiming as a general creditor of the bankrupt. This contention is sought to be supported by the affidavit of Bartlett Roper, Jr., and by the concluding clause of the decree dated Nov. 27, 1914, and entered *In the matter of R. Crawley Jones, bankrupt,* which decree will be found on page 10 of the printed motion to dismiss. The facts regarding the entry of this decree are as follows:

On November 25, 1914, Bartlett Roper, Jr., addressed a letter to W. R. Meredith, counsel for appellant (the original of which letter is filed and printed with this answer as Exhibit "C. M. D. No. 1") stating that he would apply to the Judge of the District Court for an order directing the clerk of that court to deposit the amount of the certificate representing the proceeds of the sale of the property and goods secured by the aforesaid deed of trust made by the bankrupt, under which he, the appellant, was the beneficiary, in the Planters National Bank, the depository for the bankruptcy funds, and that he would also ask the Judge to make him a reasonable allowance for his services. Appellant's counsel was prevented by another court engagement from being present at the hearing. When this motion came on, the question of the right of an appeal to this court from the decision of the U. S. Circuit Court of Appeals holding the deed of trust dated Sept. 3, 1909, to be invalid, was under investigation by appellant and his counsel. Not knowing whether said appeal would be granted or not, appellant called the attention of the learned Judge of the District Court to the written agree-

ment between Bartlett Roper, Jr., attorney for the creditors of the bankrupt, and the appellant, dated Sept. 18, 1909, whereby if the *U. S. Courts*, which includes this Court, should hold said deed of trust invalid, appellant was to have the right to share in all funds of the said bankrupt, R. Crawley Jones, as a general creditor. This agreement is printed with this answer as Exhibit "C. M D. No. 2."

Appellant states that it is not true, as is asserted in paragraph 2 on page 2 of the printed motion to dismiss, that appellant filed a proof of claim as a gen eral creditor, or took any other steps invalidating his rights as a lien creditor. Appellant never has filed any proof of claim. In fact, the appellant has always from the very beginning of this controversy purposely refrained and refused at all times to go into the District Court and file a proof of claim, either as a secured creditor, or as a general or unsecured creditor. Appellant has never, as asserted on page 4 of the printed brief of Appellee, voluntarily admitted the invalidity of the deed of trust in question; nor has he ever consented to a distribution of the fund on which he claims such lien. The District Judge's attention was called to the express agreement entered into between counsel for the creditors of the bankrupt and appellant, wherein it was agreed that in case appellant's deed of trust should be declared invalid by the *U. S. Courts* he was still to share as a general creditor in any funds of the bankrupt.

Black on Bankruptcy (1914 Ed.), Sec. 563, and cases cited.

Appellant further says, that said decree of November 27, 1914, was not entered by the District Judge with any intention of making appellant lose any of his rights as a lien creditor, but only to protect him in his rights as a general creditor under his agreement with the said Bartlett Roper, Jr., in case said deed of trust was

finally held to be invalid. His rights as a lien creditor could only be enforced in this independent suit, and were in no way involved in the bankruptcy proceedings. The decree entered in said bankruptcy proceedings was not intended to effect nor could it in any way effect this appeal, which appellant subsequently obtained, and this is shown by the above letter of the District Judge, Hon. Edmund Waddill, Jr., refusing to pay out the money arising from the sale of the property and goods under said deed of trust until this appeal has been finally determined by his Court.

The motion to dismiss should be denied.

CLAUDE M. DEAN,
By WYNDHAM R. MEREDITH and
C. V. MEREDITH,
Counsel for Appellant.

UNITED STATES OF AMERICA,
Eastern District of Virginia.

Claude M. Dean, being duly sworn, deposes and says: I have read the foregoing answer and know the contents thereof. The same is true to my own knowledge, except matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

CLAUDE M. DEAN.

Subscribed and sworn to before me this 14th day of May, 1915.

R. E. POWERS,
Deputy Clerk of the District Court of the United States for the Eastern District of Virginia.

EXHIBIT "C. M. D. NO. 1."

LETTER FROM BARTLETT ROPER, JR., TO W. R. MEREDITH.

"Bartlett Roper, Jr.,
"Attorney at Law,
"607-608 Mechanics Building,
"Petersburg, Virginia,
"November 25th, 1914.

"Mr. W. R. Meredith,
"Richmond, Virginia.

"Dear Mr. Meredith:

"Referring to the bankruptcy matter of R. Crawley Jones, Bankrupt, pending in the U. S. District Court at Richmond, Virginia, I wish to advise you that I shall on Friday, or as soon thereafter as I am able to see the Judge, ask for the entry of an order directing Jos. P. Brady, to deposit in the Planters National Bank, the designated depository for bankruptcy funds, the amount of the certificate of the National State and City Bank with accrued interest, which said certificate was deposited with said clerk to await the decision as to the validity by the U. S. Courts of a certain deed of trust dated Sept. 3rd, 1909, executed by said bankrupt and his wife.

"I shall also ask the Judge to make me a reasonable allowance out of said fund for my services as attorney for the petitioning creditors as well as counsel for the trustee in bankruptcy.

"While I do not see how there could be the slightest objection to the entering at this time of such an order, at the same time I would prefer to notify you before asking for same so that you may be heard if you so desire.

"With kindest regards, I am

"Yours truly,

"(Signed) BARTLETT ROPER, JR."

EXHIBIT "C. M. D. NO. 2."

AGREEMENT BETWEEN CLAUDE M. DEAN AND BARTLETT ROPER, JR., ATTORNEY FOR CREDITORS OF R. C. JONES, BANKRUPT.

Filed with Bill of Complaint Sept. 18, 1909.

"It is this day agreed between Claude M. Dean and Barlett Roper, Jr., Attorney for Petersburg creditors of R. C. Jones, that Ed. C. Dean, Trustee, named in D. T. from R. C. Jones & wife, dated Sept. 3rd, 1909, is to resign as trustee & W. P. Wells is to be substituted as trustee in his place with all the powers and without prejudice to the rights of the said Claude M. Dean & the creditors of R. C. Jones. It is further agreed that said W. P. Wells is to deposit all funds that come into his hands in some bank on certificate to await the decision of the U. S. Courts as to the validity of a certain deed of trust from R. C. Jones & wife, dated Sept. 3rd, 1909, securing $1,600 & int. recorded Sept. 11, 1909, or may be paid over on mutual agreement of the said Claude M. Dean & Bartlett Roper, Jr., attorney as aforesaid. It is further understood that in the event said Deed of trust is declared invalid, the said Claude M. Dean to have the right to share in all funds in the hands of the substituted trustee (W. P. Wells) realized from sale of all goods, land, etc., under said D. T. or any other funds of said R. C. Jones from any source as a general creditor. It is further agreed that said E. C. Dean, trustee, is to be paid his expenses so far incurred by him as trustee.

"(Signed) CLAUDE M. DEAN.
"BARTLETT ROPER, JR., Atty."

(The original of this Exhibit is on file with the Clerk of this Court, and the same appears on page 15 of the transcript of record in this case filed in this Court.)

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SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, AND W. P. WELLS, SUBSTITUTED TRUSTEE,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

On December 24, 1909, a petition was filed in the District Court of the United States for the Eastern District of Virginia by certain creditors praying that one R. Crawley Jones, be adjudged an involuntary bankrupt, and on April 25, 1910, the said R. Crawley Jones was adjudicated a bankrupt. An appeal was taken by the said Jones from said order adjudicating him a bankrupt to the United States Circuit Court of Appeals for the Fourth Circuit. On this appeal the main conten-

tion was that in giving a certain deed of trust dated Sept. 3, 1909, your petitioner had obtained an unlawful preference. The Circuit Court of Appeals did not approve that position, but, on the contrary, held as follows:

****"That at the time of the filing of the petition he was insolvent and that being so insolvent, he did prefer certain of his creditors *who then held his notes*, which had been theretofore executed for value by him and were then held by the banks in Petersburg, Virginia.****"

And on that ground affirmed the order of the District Court adjudicating the said Jones a bankrupt. (Record, page 56.)

The matter was then referred to the Referee in Bankruptcy, and at a meeting of the creditors held before him, R. Beale Davis, Jr., was elected trustee in bankruptcy of the estate of the said R. Crawley Jones, bankrupt.

Afterwards on March 5, 1912, the said R. Beale Davis, Jr., trustee in bankruptcy of the estate of the said R. Crawley Jones, brought a suit in equity in the District Court of the United States for the Eastern District of Virginia against Claude M. Dean, the beneficiary in a certain deed of trust executed on September 10, 1909, which was given by the said R. Crawley Jones, bankrupt, to secure a cash loan of $1,600, made to him on the 3rd day of September, 1909, by the said Claude M. Dean. The deed of trust being given for a present consideration in pursuance of an agreement to give the specific security at the time the loan was made. The complaint filed in the said cause closed with a special prayer in the following language:

"That the said deed of trust, executed and delivered by the said R. Crawley Jones and Marie E. Jones,

his wife, dated September 3, 1909, and recorded in the clerk's office of the Circuit Court of Dinwiddie County, Virginia, on the 11th day of September, 1909, be annulled, vacated, set aside and declared void, as having been made by the said R. Crawley Jones WITH THE INTENT TO PREFER THE SAID CLAUDE M. DEAN OVER HIS OTHER CREDITORS OF THE SAME CLASS." (Record, page 10.)

On October 14, 1912, the defendant, Claude M. Dean, filed his answer and said answer contains a full, complete and fair statement of all the facts in the case and of the transaction in question. (Record, page 47.) Thereupon the entire evidence in the case was taken before a NOTARY PUBLIC and filed in open Court on Feb. 15, 1913. (Record, page 58.)

An examination of the bill of complaint shows that the chief, if not the sole ground for claiming that the deed of trust in question is an unlawful preference, under Sec. 60b of the Bankruptcy Act, is that the loan was made on the 3rd day of September, 1909, whilst the deed of trust was not actually executed for a week afterwards.

The District Court ruled on this point as follows:

"With regard to the first question, the Court holds that on the 3rd of September, 1909, Claude M. Dean *was not a creditor* of the bankrupt, R. Crawley Jones. On that day he advanced for the bankrupt, R. Crawley Jones, the sum of $1,600.00 in pursuance and on the faith of an agreement on the part of R. Crawley Jones to give him a mortgage upon all his property to secure re-payment. This was a present valuable consideration, and the mortgage, although actually executed a few days subsequent, was executed in pursuance of a direct promise made in consideration of a present actual sufficient valuable consideration, and upon which the same was based, and was executed under circumstances so nearly in point of time as to be practically contemporaneous with the loan, and in the opinion of

this Court it is, therefore, not a mortgage given by way of preference to a pre-existing creditor so far as Claude M. Dean is concerned, but a mortgage given for a present actual valuable consideration." (Record, page 34.)

From this part of the decision of the District Court the trustee, the appellee in the Circuit Court of Appeals, did not ask for or take a cross-appeal, and by omitting to do so, we respectfully contend, he admits the correctness of the decision and the case stood in the Circuit Court of Appeals the same as if the alleged error had been waived at the hearing. *Loudon* v. *Taxing District*, 104 U. S., at page 774; *Field* v. *Barber Asphalt Co.*, 194 U. S., page 621, and cases cited.

DECISION OF THE DISTRICT COURT.

As the opinion of the Circuit Court of Appeals, on page 139 of the record, so clearly and concisely states what the decision of the District Court in this matter is, we shall adopt the same *in toto*, which is as follows:

"The District Judge held first, that Dean was not a creditor when the trust deed was executed, but, on the contrary, took the trust deed as security for money lent at the time, and that, therefore, the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankruptcy Statute; and, second, that while Dean had no moral obliquity, yet that when he accepted the deed of trust he had reasonable cause to believe that Jones was insolvent, and that its effect would be to defeat the provisions of the Bankrupt Law, and on this ground adjudged the deed of trust fraudulent under Section 67e of the act." (Record, page 139.)

An appeal was duly taken to the United States Circuit Court of Appeals for the Fourth Circuit by the defendant, Claude M. Dean, from that part of the decision

of the District Court adjudging "the deed of trust" given to him by the said bankrupt "fraudulent under Section 67e of the Bankrupt act;" but no cross-appeal was taken by the trustee from that part of the decision of the District Court adjudging that the said "Dean was not a creditor when the deed of trust was executed, but, on the contrary, took the trust deed as security for money lent at the time, and that, therefore, the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankrupt Statute."

The Circuit Court of Appeals in its opinion (Record, p. 138) held that the deed of trust in question was invalid, both under Sec. 60b and Sec. 67e of the Bankruptcy Act. The Senior Circuit Judge, presiding, only concurred in the result.

While the decision of the Circuit Court of Appeals affirms the decision of the District Court, yet in effect it only affirms it in so far as it held that the deed of trust in question was fraudulent under Sec. 67e of the Bankruptcy Act, and reversed the decision of the said District Court in so far as it held "that Dean, the appellant here, was NOT A CREDITOR (of the bankrupt) when the trust deed was executed, but, on the contrary, took the trust deed as security for money lent at the time, and that, therefore, the deed of trust could not be annulled as a preference given to an existing creditor under Section 60b of the Bankrupt Statute." (2nd Paragraph opinion Circuit Court of Appeals. Record, p. 139.)

From the decision of the Circuit Court of Appeals for the Fourth Circuit an appeal was sued out to this Court—said appeal being taken previous to the Act of January 28, 1915.

SPECIFICATION OF ERRORS.

The grounds on which the appellant insists that the decree appealed from is erroneous are set forth in the assignment of errors beginning on page 173 of the record, which assignment of errors for brevity, so as to not encumber this brief unnecessarily, are put in the form of nine questions, as follows:

THE NINE QUESTIONS INVOLVED IN THE CASE FOR DETERMINATION ARE:

FIRST. Whether or not the Circuit Court of Appeals erred in not reversing the order of the District Court overruling the demurrer filed by the appellant to the bill of complaint in the cause?

(*This question is covered by assignment of error No. 1.*)

SECOND. Whether or not the Circuit Court of Appeals erred in affirming the holding of the District Court that the bankrupt R. Crawley Jones, was insolvent on the 1st day of September, 1909, and that Claude M. Dean at the time he advanced the money had reasonable cause to believe the said Jones insolvent?

(*This question is covered by assignment of errors Nos. 8, 9, 10, 13, 14, 17 and 18.*)

THIRD. Whether or not the Circuit Court of Appeals had the right to hold the deed of trust in question invalid as a preference under Sec. 60b of the Bankruptcy Act, after said District Court having held that Dean was NOT a creditor of the bankrupt and that the deed of trust was given to Dean as a security for money lent at the time, and from which decision, which was adverse to the appellees, they failed to take a cross appeal?

(*This question is covered by assignment of errors Nos. 3 and 7.*)

FOURTH. Assuming that the Circuit Court of Appeals had a right to decide the preceding third question, although no cross-appeal was taken by the appellees, whether or not its decision holding that the deed of trust in question is void under Sec. 60b of the Bankruptcy Act is erroneous?

(*This question is covered by assignment of errors Nos. 3, 5, 6, 7, 9, 10 and 15.*)

FIFTH. Whether or not the Circuit Court of Appeals erred in affirming the decree of the District Court setting aside the deed of trust in question under Sec. 67e of the Bankruptcy Act, as having been given with the intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors?

(*This question is covered by assignment of errors Nos. 2, 4, 12, 16, 19, 20 and 21.*)

SIXTH. Whether or not the Circuit Court of Appeals decision in this cause is erroneous in holding that the deed of trust in question is void under Sec. 67e of the Bankruptcy Act, in that the complaint filed in the cause does not pray for any relief under this section of the Act, and even assuming that it does, whether or not said decision is still erroneous in holding that the deed of trust in question, under the circumstances and facts in this case, is invalid under said Sec. 67e?

(*This question is covered by assignment of errors Nos. 2, 4, 5, 6, 7, 9, 10, 11, 12 and 15.*)

SEVENTH. Whether or not the Circuit Court of Appeals erred in holding that "But Dean has much

more to overcome than mere knowledge that the money was lent to be used to pay an existing debt. Charged with notice of the insolvency of the debtor, *his purpose was to extricate Jones from embarrassment by acting with and for him in preferring a pressing debt.* In pursuance of this purpose, as agent for the debtor and in his behalf he actively participated in satisfying the pressing creditor, and taking up the pressing debt by means of the secured debt to himself. Even if the banks' notes had been marked paid, the whole transaction showed on its face that there was not that novation that the bankrupt statute contemplates as necessary to the protection of a lender. Looking away from the form to the substance, by his participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt, Dean tied himself to the old debt, and the notes given him must be regarded mere substitution of new papers for the old?"

(*This question is covered by assignment of error No. 10.*)

EIGHTH. Whether or not the Circuit Court of Appeals erred in holding that "The reason is still stronger for holding it (the deed of trust in question) invalid when the lender acts as agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his (the bankrupt's) own benefit?"

(*This question is covered by assignment of error No. 11.*)

NINTH. Whether or not a deed of trust, given by one merely charged with a crime, to secure a present loan, the proceeds of which are to be used in paying certain of his debts to extricate himself from the embarrassment of the charge, is valid under the bankruptcy act,

even though the grantor is insolvent, and the lender knows that the money he is loaning is to be so used?

(*This question is covered by assignment of errors Nos. 9, 10, 11, 12, 13, 14, 16, 18, 19, 20 and 21.*)

The foregoing questions will be discussed in their numerical order.

BRIEF OF THE ARGUMENT.

FIRST QUESTION.

Whether or not the Circuit Court of Appeals erred in not reversing the order of the district court overruling the demurrer filed by the appellant to the bill of complaint?

THE DEMURRER SHOULD HAVE BEEN SUSTAINED.

A demurrer to the bill of complaint was filed by the defendant, Claude M. Dean. The bill set out only one ground for setting aside the deed of trust of September 3, 1909. That was that it had been given by Jones with intent to *prefer* Dean over his other creditors of the same class. The prayer of the bill was that the deed for that reason might be set aside and declared void. The main ground for alleging this deed of trust to be an unlawful preference, as we have already pointed out, was that it was given about a week after the loan was made. Hence it was claimed that Dean was a pre-existing creditor, and that the deed was an unlawful preference. As originally made in the bill, this charge seemed to be true. But by agreement of counsel certain evidence contained in the record on appeal from the order adjudicating R. Crawley Jones a bankrupt, was filed as an exhibit with the bill. This evidence showed that whilst the deed of trust was given subsequent to the loaning of the Sixteen hundred

($1,600.00) dollars in cash, yet the same was given in pursuance of the promise or agreement contained in Jones' letter, dated September 1, 1909, and that it was only because of this promise that Dean was induced to make the advancement. The deed of trust having been made in pursuance of his agreement, entered into at the time the consideration passed, which was executed under circumstances so nearly in point of time as to be practically contemporaneous with the loan, made the security as valid as if the conveyance had been made simultaneous with the granting of the loan, and the District Court held to this effect. (Record, p. 34.)

The only ground of attack contained in the bill of complaint having thus been overruled, it would seem that there was nothing to do but to sustain the demurrer. There was no allegation in the bill that the deed of trust was not given or accepted in good faith, nor was it charged to have been made in fraud of the Bankrupt Act, nor did the special prayer of the bill seek relief upon those grounds. But despite the absence of these necessary allegations, the District Court held that the lien of this deed of trust had not been given or accepted in good faith, but that the same was made in contemplation of and in fraud of the bankrupt law, and held the deed of trust fraudulent under Sec. 67e of the Bankrupt Act. (See paragraph 2 of opinion, U. S. Cir. Court of Appeals, Record, p. 139.) It further held that, even though these allegations were absent, yet the bill showed sufficient facts from which it could be deduced that it was given and accepted in fraud of the bankrupt law; that the relief prayed for on this ground would be granted under the general prayer, though no such relief was specially asked for.

But we respectfully submit, that neither the facts set out in the bill nor the prayer thereof justified the

overruling of the demurrer. There is no allegation of fraud contained in the bill, nor was there any attempt to have the deed of trust set aside under Sec. 67e, of the Bankruptcy Act, as having been given by the bankrupt *with intent and purpose on his part to hinder, delay or defraud his creditors, or any of them,* nor is there any allegation in the bill that the deed in question is one that should be held null and void as against the creditors of the bankrupt under the laws of this State. And finally there is no allegation or facts contained in the bill of complaint as amended by the exhibit filed therewith, which justifies the claim that this deed of trust was not accepted in good faith, but in fraud of the act.

There being no such allegations, and the only specific prayer being to have the deed set aside as an unlawful preference, the Circuit Court of Appeals should have reversed the lower court and remanded the cause with directions that the demurrer should be sustained. Though the bill also contained a prayer for general relief, *the Court can only grant such relief thereunder as is consistent with the case made by the bill, and also consistent with the relief specially prayed for.* No such case, as we have pointed out, is contained in the bill of complaint. The relief there prayed for was to have the deed of trust set aside as an unlawful preference, whilst the relief that was sought to be granted by the lower court, was the setting aside of the deed on the ground that it was fraudulent; the relief is plainly inconsistent with the relief prayed for.

Woolfolk v. *Groves*, 113 Va., page 182, 195 and 196; 1 Barton Ch. Pr. (Ed. 1881), page 216; 3 A. & E. Encyp. of Pl. & Pr., page 350 and note 3; 16 *Id.*, page 804; *Warren* v. *Moody*, 122 U. S., 137-138.

The demurrer, therefore, should have been sustained, and the Circuit Court of Appeals erred in not so directing.

PLAINTIFF CANNOT PLEAD ONE CAUSE OF ACTION AND RECOVER ON ANOTHER.

"The fundamental rule is that the judgment shall be *secundum allegata et probata* and any departure from that rule is said to produce surprise, confusion and injustice. Pleadings and a distinct issue are essential in every system of jurisprudence and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. *Brighton* v. *Claflin Co.*, 180 N. Y., 76; *Ambromovitz* v. *Markowitz*, 58 Misc., 231; 108 Supp., 1044. No judgment can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings or evidence. *Tuthill* v. *Myrus*, 57 App. Div., 37; 68 Supp., 37."

Bradbury's Rules of Practice, p. 194, Sec. 3.

IF OBJECTION IS MADE A MATERIAL VARIANCE IS FATAL.

"A plaintiff having failed to prove the cause of action set up in the complaint and proper objections having been made on the trial, and no amendment of the pleadings having been asked for, a judgment in plaintiff's favor on a cause of action not alleged cannot be sustained on appeal. *Ambromovitz* v. *Markowitz*, 58 Misc., 231; 108 Supp., 1044; *Northam* v. *Dutchess County Mutual Insurance Co.*, 177 N. Y., 73; *Korn* v. *Weir*, 88 Supp., 976."

Bradbury's Rules of Practice, p. 195, Sec. 5.

"A complaint in an action by a trustee in bankruptcy, to set aside a transfer made by the bankrupt, on the allegation that it was made in fraud of creditors and violated Sec. 60 of the Bankruptcy Act, a recovery cannot be had where it appears upon the trial that the transaction was made by reason of fraud practiced upon the bankrupt, and that the action should be founded on Sec. 70 of the Bankruptcy Act, as the variance is fatal. *Stern* v. *Mayer*, 133 App. Div., 181; 98 Supp., 1028. In an action to set aside a conveyance as fraudulent the court is not authorized to make a finding that the conveyance was not fraudulent, but was intended as a mortgage where facts are not set forth in the complaint authorizing such a judgment, nor does the complaint contain any demand for such relief. *Truesdale* v. *Sarles*, 104 N. Y., 164."

Bradbury's Rules of Practice, p. 201.

"Under a complaint in an action by a trustee in bankruptcy, to set aside a transfer made by the bankrupt, on the allegation that it was made in fraud of creditors and violated §60 of the Bankruptcy Act, a recovery cannot be had where it appears upon the trial that the transaction was made by reason of fraud practiced upon the bankrupt and that the action should be founded on §70 of the Bankruptcy Act, as the variance is fatal. *Stern* v. *Mayer*, 113 App. Div. (N. Y.), 181; 98 Supp., 1028."

"In an action to set aside a conveyance as fraudulent the Court is not authorized to make a finding that the conveyance was not fraudulent, but was intended as a mortgage where facts are not set forth in the complaint authorizing such a judgment, nor does the complaint contain any demand for such relief. *Truesdale* v. *Sarles*, 104 N. Y., 164."

Bradbury's Rules of Pleading, p. 201.

SECOND QUESTION.

Whether or not the Circuit Court of Appeals erred in affirming the holding of the district court that the bankrupt, R. Crawley Jones, was insolvent on the 1st day of September, 1909, and that Claude M. Dean at the time he advanced the money had a reasonable cause to believe the said Jones insolvent?

We respectfully submit that at the time of the giving of the deed of trust in question Jones was not insolvent, and even if he was, it has not been shown that Dean had reasonable cause to believe him insolvent.

The learned District Judge admits that both of these facts must be established by the trustee in bankruptcy in order to set aside the deed of trust given for a present consideration.

On September 1, 1909, R. Crawley Jones, the bankrupt, was engaged in two lines of business at or near Darvills, in the County of Dinwiddie, in the State of Virginia. He was carrying on farming operations, and at the same time had a store for general merchandise, where a large business had been conducted for many years by Jones and his predecessors. He had every appearance of prosperity and enjoyed unusual credit, and a reputation for business success. Record, p. 102.

Claude M. Dean was his brother-in-law, and although he had never been to his place, had heard from various sources of Jones' standing and prosperity. Dean had no knowledge of either farming or mercantile pursuits, but lived in the City of Richmond, where he was the Deputy Clerk of one of the Courts. On the previously mentioned date Jones wrote his brother-in-law that he was in pressing need of Sixteen hundred ($1,600.00) dollars in cash. He stated he was in serious trouble,

being charged with a grave offense. Even though he could prove himself innocent, yet there would always be the disgrace to his wife and child of his arrrest on such a charge. He stated in his letter that he had enough to more than pay Dean five times over the amount asked for. He enclosed notes for Sixteen hundred ($1,600) dollars, and stated he would secure them by a proper deed of trust on everything he possessed as soon as Dean could prepare the same. That all he needed was a little time when he would repay the amount loaned. Record, p. 32.

At that time the Virginia National Bank, one of the banks in the City of Petersburg, held three notes of Jones', one for Six hundred and fifty ($650.00) dollars, one for Six hundred ($600.00) dollars, and a third for something like Six hundred ($600.00) dollars. Record, p. 66 and 67.

Concerning the genuineness of one of the signatures on these notes some question had been raised. According to the testimony of the Cashier of the Virginia National Bank, this was a *mere rumor* and he or the officers of the bank had sought to prevent its spread. The bank, however, had demanded payment of all three of these notes. Record, p. 103 and 104. This was the occasion of the writing of the above described letter by R. Crawley Jones to his brother-in-law Dean. The letter was brought by the father of the bankrupt, J. Samuel Jones. In answer to Dean's inquiry, the latter stated that his son's financial condition was very good and that he was loaning him Five hundred ($500) dollars without any security. He said, that both at the store and on the farm his son was doing a good business. He estimated his corn crop to be worth Five or Six hundred dollars, and his tobacco crop to be worth Three or Four hundred dollars. His son was building a new dwelling

house by day labor and this had taken a great deal of cash money, and therefore, he needed ready cash with which to take up the above mentioned notes, and thus relieve himself of any chance of embarrassment. He further stated that his son would be able then to carry on his farming and his business, and would return the money to Dean. Record, p. 101.

Dean had confidence in J. Samuel Jones, a confidence which the record shows was shared by everyone. Believing implicitly in the accuracy of the foregoing staements, Dean told J. Samuel Jones that he did not have as much as Sixteen hundred ($1,600) dollars, but would secure the same the next day. He directed Jones to stop at the banks in Petersburg and see if payment at that time would be alright. Jones did so, and wired Dean to meet him in Petersburg the next day, and that the matter could be arranged. This telegram was prepared by the Cashier of the Virginia National Bank. Record, pp. 18 and 24 and 102.

The Cashier of the bank was J. W. Long. In order to have the assurances given him by J. Samuel Jones corroborated, Dean called on Cashier Long with a view of accurately ascertaining the financial situation of R. Crawley Jones. Record, p. 103.

This was particularly necessary, as Dean had to borrow the money and could not afford to loan it to the bankrupt, however urgent his need, except upon good security. "If I had thought for a moment that I was not receiving good security, I would not have made the loan." Record, p. 103. Cashier Long confirmed the statements as to Jones' solvency which had already been made to Dean by J. Samuel Jones.

As to the exact facts and views of Jones' financial condition furnished him by Cashier Long, Dean's recol-

lection was very clear and his testimony strong and positive. He gave his testimony on this point a short time after the conversation had taken place, that is at the hearing on the petition for adjudication filed by Jones' creditors. On the other hand, J. W. Long was not called on to testify until almost four years after the conversation took place. His recollection, to say the least, was very hazy, and he did not attempt to contradict or deny Dean's account of what took place, but contented himself with simply saying "I don't recollect;" "I don't remember. I am not positive." Record, p. 62, 63, 64, 65, 67 and 68.

There could have been no better source of information to which Dean could apply, and certainly no one has pointed out any better source for learning the condition of Jones' finances and business than the Cashier of the bank at which Jones dealt.

Some criticsm is attempted, however, to be offered because Dean did not make an examination of Jones' books. In the first place those who know how the books of a country merchant are usually kept, also know how little information can be obtained from them. Even in the bill where this charge is made, it is not pretended that such an examination would have disclosed the fact of Jones' insolvency, or would have shown anything, except that he was indebted on various mercantile accounts. And finally as Dean himself testifies, Dean had no expert knowledge of such books and could have gained little or no information from them. There was no mercantile agency to which Dean could apply in order to ascertain R. Crawley Jones' financial standing. The best source of information, therefore, was the Cashier of the bank at which Jones dealt. He not only had the usual source of information possessed by such institutions regarding the financial ability of their customers, but five members of the board of directors of this bank

were five of the largest creditors of R. Crawley Jones. Record, p. 71 and 104. Cashier Long had discussed with his directors the rumor regarding the genuineness of one of the signatures on these notes. Record, p. 104. He had also made a trip to the home of the bankrupt's father to investigate the affairs of R. Crawley Jones, and to arrange for the payment of these notes. Long testifies that whilst at that time there was some rumor around town that Jones had been over trading, he had heard nothing definite against his financial condition and did not know at that time that R. Crawley Jones was insolvent. Record, p. 63 and 94. He also told Dean that he had investigated and was of the opinion that Jones had plenty to pay everybody. Record, p. 103.

In this way Dean had exhausted every available means for ascertaining whether or not R. Crawley Jones was insolvent, and his ability to go on with his business, provided he received this temporary aid. No other source has ever been suggested from which information on these points could have been obtained, except the examination by Dean of Jones' books, the futility of which we have already pointed out. If this expert bank officer, J. W. Long, who had visited the father of R. Crawley Jones, and like Dean, had received assurances of his son's financial ability, did not know or have reasonable ground to believe that Jones was insolvent, but, on the contrary, stated that he had plenty to pay everybody, then how can knowledge of or reasonable ground to believe in Jones' alleged insolvency be imputed to Claude M. Dean?

With the assurances, thus above set forth, of the bankrupt himself, of his honest old father, and of Cashier J. W. Long, as to Jones' financial condition being good, and that he was not in any sense insolvent, appellant borrowed the Sixteen hundred ($1,600.00) dol-

lars on his personal note and loaned the same to R. Crawley Jones. Record, p. 103.

In his bill of complaint the trustee alleges and admits that the banks did not know or have reason to believe at the time these notes were paid, that R. Crawley Jones was insolvent. What reason then can be given for claiming that at that time Dean knew or had reason to believe Jones to be insolvent? The banks knew all the facts about Jones' monetary condition, including the rumor that one of the endorsements on the notes was forged. Five of their directors were among Jones' largest creditors. If the banks, despite this knowledge, did not have reasonable ground to believe Jones to be insolvent, the same is yet more true of Dean. Record, p. 94 and 104 and 112.

With the Sixteen hundred ($1,600.00) dollars, and some Six hundred ($600.00) dollars more advanced by J. Samuel Jones, the latter paid the notes held by the Virginia National Bank, and those held at one other bank. By direction of R. Crawley Jones, he turned over these notes to Dean, so that he could possess evidence that the money advanced by him had been applied to a reduction of the indebtedness of R. Crawley Jones. Record, p. 121.

If Dean, as we have seen, was justified at the time of making the loan in believing that R. Crawley Jones only needed a little ready cash to extricate himself much more was he entitled to believe in the solvency of R. Crawley Jones when he went to Darvills to have his deed of trust signed and executed. If any suspicion of the ability to pay his debts on the part of R. Crawley Jones lingered in the mind of Dean, after his interview with the cashier it was entirely dissipated when he saw the apparent prosperity existing both on the farm and at the store of Jones. Jones stated to him that he would make about One hundred barrels of corn, which would

bring in about Five or Six hundred dollars; that his tobacco crop would bring between Three and Four hundred dollars; that his farm was very valuable and he considered it worth between forty-five hundred ($4,500.00) and Five thousand ($5,000.00) dollars. Record, p. 105. He also called Dean's attention to his live stock, and Dean also saw the comfortable character of his house and his general air of prosperity. All of this confirmed Dean in the conviction that the statements made to him by Long, the Cashier, and by the father of R. Crawley Jones as to the financial condition of the latter, were true.

On this occasion he learned for the first time that there was a deed of trust on the farm for Three thousand ($3,000.00) dollars. Jones, however, insisted that his equity in the farm was worth at least Fifteen hundred $1,500.00) dollars. In this belief Dean himself united, and it was later on confirmed by Cleveland Wright, one of Jones' creditors, who stated to Dean that he believed the farm was worth about Five thousand ($5,000.00), and that he intended to buy it in at a reasonable figure, for he knew the value of it, and in this way if he did not get the money due him he would make it out of a re-sale of the farm. (Record, p. 105 and 106.)

The balance of the purchase price of the farm was represented by long term notes, having three, four and five years to run. Jones only had to pay the annual interest on these notes, and it would be several years yet before the first principal note fell due.

Much is made out of the fact that the deed of trust given Dean covered practically all of the property of R. Crawley Jones, and being so excessive as to raise a presumption of fraud. Indeed, Jones himself raised the question as to the necessity of including all these

things in the deed. The burden of proving this charge was on the trustee, and we submit that Dean's explanation fully answers this objection. It was necessary, in order to conform to the terms of Jones' letter to Dean, dated September 1, 1909. The deed of trust, subsequently given to secure said loan, could only be held valid when shown to have been made in conformity with the specific promise, which was the inducement for making said loan. 1 Loveland on Bankruptcy (Ed. 1912), page 952. If Dean had attempted to vary this promise in any way, these creditors would have been the first to have claimed that on that ground the deed of trust must be held invalid, as not in accordance with the specific security promised. Besides the deed was a mere security and everything after the $1,600 had been realized would revert back to Jones.

The foregoing establishes conclusively, we submit that Dean did not know at the time he loaned the Sixteen hundred ($1,600.00) dollars, that R. Crawley Jones was insolvent, nor did he have reasonable ground to believe that said Jones was insolvent.

The Supreme Court in the case of *Grant* v. *National Bank*, 97 U. S. 80, said:

> "Some confusion exists in the cases as to the meaning of the phrase, 'having a reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read: 'having reasonable cause to suspect such a person insolvent.' But the two phrases are distinct in reason and effect. It is not enough that a creditor has some cause to suspect the insolvency of a debtor; but he must have such knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the

intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim and have strong desire to secure it, and yet such belief as the Act required may be wanting. Obtaining additional security or receiving payment of the debt, under such circumstances, is not prohibited by the law. * * * * * *

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided. * * *

"It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination, and yet it is equally apparent, independent of their sworn statements on the subject, that they supposed that there was a possibility of his doing so * * * * * Without going into the evidence in detail, it seems to us that it only establishes the fact that the officers had reason to be suspicious of the bankrupt's insolvency when their security was obtained, but that it falls short of establishing that they had reasonable cause to believe that he was insolvent."

Speaking of the above case, the Supreme Court said, in *Stuckey* v. *Savings Bank*, 108 U. S., 74:

"That case established the doctrine that a creditor, dealing with a debtor, whom he may suspect to be in failing circumstances, of which he has no

sufficient evidence, may receive payment or security without violating the bankrupt law."

Judge Connor applies the rule laid down in *Grant* v. *Bank, supra,* in case of *In re Carlile,* 29 Am. Bank Rep., p. 373-382.

Applying the doctrine laid down in the above cases to the case at bar, can it be seriously contended that Dean had more than a mere suspicion of Jones' insolvency, if even that?

The burden of proving this alleged insolvency of Jones, if a material fact, rested upon the trustee of the bankrupt.

Calhoun City Bank v. *Cain,* 152 Fed., 983.

Yet we submit that there is no evidence, and certainly no conclusive evidence, in this record that R. Crawley Jones was insolvent on September 3, 1909, the date of the making of the loan. It is true Jones has been adjudged insolvent as of the 24th day of December, 1909, the day of the filing by his creditors of a petition of involuntary bankruptcy. But this transaction of the loan took place several months before this date. The action of the creditors in filing their petition necessarily destroyed the value of the assets held by Jones, and of course his business would no longer be a going concern. Yet from a fair valuation it would seem that in September, 1909, Jones was not insolvent, and that if he had been allowed to continue his business in the usual way he might have paid off his indebtedness in the ordinary course of business as it fell due. Record, p. 77 and 78; Record, p. 23 and 110. The account stands as follows:

List of Assets of R. Crawley Jones as disclosed by the Testimony in this Case.

1. Farm of 201 acres and buildings thereon. This value Dean bases on information he obtained from the bankrupt and Cleveland Wright, one of Jones' largest creditors, and a member of the Board of Directors of the Virginia Nat'l Bank and a member of the Committee of the creditors of Jones. Record p. 105-106.	$5,000.
2. Stock of good in store. Well's testimony. Record p. 77 & 78. Dean's testimony. Record p. 110. (These goods inventoried at $2,607.76). Record p. 76.	3,000.
3. Accounts due R. C. Jones. Well's testimony. Record p. 27 and Bill of Complaint. Record p. 8. Dean's testimony. Record p. 112.	500.
4. Personal property on farm, such as live stock, farming implements, mules, wagons, harness, etc., which were sold by Quick, trustee for	534.25
5. Corn crop, tobacco crop and pea crop. Dean's testimony. Record p. 111.	1,000.
6. Household and kitchen furniture. Dean's testimony. Record p. 111.	800.
Total am't. of assets	$10,834.25

LIST OF LIABILITIES OF R. CRAWLEY JONES AS DISCLOSED BY TESTIMONY AND EXHIBITS IN THIS CASE.

1. Amount of provable debts filed in the case of R. Crawley Jones, involuntary bankrupt. Complainant's Exhibit B. C. S. "B" Record p. 83. By reference to this exhibit, it will be seen that the debt due R. E. Blakey for $2,250 is evidenced by 2 notes dated Feb. 20, 1909, and payable 1 & 2 years after date respectively, each for 1-2 of this amount. Record p. 83.	$5,394.08	
2. Amount due on farm. Quick's testimony, Record p. 59. Amt. due on farm is evidenced by 3 notes, dated Feb. 20, 1909, for $1,000 each, and payable 3, 4 and 5 years after date. Record p. 85.	$3,000	
Total amt. liabilities		8,394.08
The testimony therefore in this case conclusively shows Jones to have been solvent by		$2,440.17
Deducting therefrom amount of notes given Dean and secured by deed of trust		1,600.
The evidence still shows Jones to be solvent by		$840.17

ANOTHER ILLUSTRATION OF JONES' SOLVENCY.

Jones' solvency is even better illustrated by taking the amount of the provable debts filed against his estate before the Referee, viz:		$5,394.08
(Record page 83) and the amount owing on farm		3,000.00
(Record page 85), making his total liabilities		$8,394.08
and then deducting therefrom the amount owing on the farm, because no part thereof was or would become due for more than three years. Record p. 85).	$3,000	
and further deducting therefrom the amount owing to R. E. Blakey, because one-half of same would not be due for more than six months, and the other half would not be due for 18 months. (Record p. 83) this would cut down Jones' indebtedness at the time of the giving of the deed to	2,250	$5,250.00
		$3,144.08

Which amount could have easily been realized alone from the sale of the stock of merchandise in Jones' store, had he been permitted to dispose of said stock in the ordinary course of business, and W. P. Wells, the trustee, a witness for the complainants below (appellees here), so testified. Record, p. 77-8.

Moreover it was the duty of the trustee in bankruptcy to have placed Jones upon the stand so as to show what were his assets on September 3, 1909, or to have obtained this proof from other sources. It must be presumed that Jones was examined and his books of account were before the Referee as required by law. Although this evidence of Jones' financial condition was at hand, the complainant trustee has not seen fit to file the same in this case. It was material, perhaps the most material, evidence on the question of Jones' insolvency as of September 3, 1909, and the failure to introduce the same raises a fair presumption that Jones was not insolvent at that date.

DEAN DID NOT HAVE REASONABLE GROUND TO BELIEVE JONES INSOLVENT.

But even if Jones had been shown by the evidence in this case to be insolvent at that time, the clear preponderance of the evidence is to the effect that Dean had no reasonable ground to know of such insolvency. Yet the burden of proof was equally upon the trustee to show that Dean knew or had reasonable ground to believe Jones insolvent on September 3, 1909. The trustee has failed to establish either point and, therefore, the deed of trust must be held valid.

Calhoun City Bank v. *Cain*, 152 Fed., page 983. (C. C. A. 4th Ct.).

In re Carlile, 29 A. B. Rep., 373-380. (D. C. 4th Ct.)

On November 16, 1909, Jones furnished to Thomas, one of his creditors, a list of his debts and names of the parties to whom they were due. But this list does not show when these debts were contracted, whether before or after September 3, 1909. Jones furnished it with a view of satisfying his creditors of his solvency. The statement seems to have had this effect, as for more than a month thereafter his creditors took no action, as they would most likely have done, had they believed him to be insolvent.

THIRD QUESTION.

Whether or not the Circuit Court of Appeals had the right to hold the deed of trust in question invalid as a preference under Sec. 60B of the bankruptcy act, after the said district court having held that Dean was not a creditor of the bankrupt and that the deed of trust was given to Dean

(appellant here) as a security for money lent at the time, and from which decision, which was adverse to the appellees, they failed to take a cross-appeal?

It is the well settled ruling of this Honorable Court that an appeal brings up for review only that which was decided adversely to the appellant, and that a party not appealing cannot take advantage of an error committed by the lower court against him. If the appellees in this case had desired to avail themselves of the alleged error of the District Court in deciding adversely to them the question of preference under Sec. 60b of the Bankrupt Act, they should have taken a cross-appeal to the Circuit Court of Appeals. By omitting to do so, they admit the correctness of the decision of the District Court on this question as to them; and the case stood before the Circuit Court of Appeals the same as if the alleged error had been waived at the hearing. Therefore, the holding by the Circuit Court of Appeals that the deed of trust given to Dean, the appellant here, was void as a preference under Sec. 60b of the Bankruptcy Act, was an error, because that question was not before it, and its decision, therefore, on this point, should be reversed in the interests of the due administration of justice and the uniformity of decisions, and further because the Circuit Court of Appeals for the Fourth Circuit should have followed and observed this well established rule, which has been repeatedly affirmed and uniformly followed by this High Court for a half a century.

AUTHORITIES IN SUPPORT OF APPELLANT'S CONTENTION AS TO THIS QUESTION.

The following authorities are respectfully cited in support of appellant's contention that the question, as

to the deed of trust to your appellant being a preference under Sec. 60b, was not before the Circuit Court of Appeals for decision, and that it was error for it to pass upon same adversely to your appellant.

AUTHORITIES.

This Honorable Court, in the leading case on the question in point, in *Chittenden* v. *Brewster*, 2 Wall., page 195, said:

"It does not appear from the proofs in the case, that executions had been issued, and returned unsatisfied, as averred in the bill, and for the proof of which the answer of defendants called; and it is objected by the counsel for the *appellees* that this defect is fatal to the right of the complainants to maintain their bill. *This would be so, if the appellees*, against whom the decree was rendered, *had appealed from the same*, as in the case of *Jones* v. *Green*. See also *Day* v. *Washburn*. *But here the complainants only have appealed, and the rule is settled in the appellate court, that a party not appealing cannot take advantage of an error in the decree committed against himself.* * * * *If the appellees desired to avail themselves of this error in the decree they should have brought a CROSS APPEAL. By omitting to do so, they admit the correctness of the decree as to them. The case stands before the appellate tribunal the same as if the error had been waived at the hearing.*" (Italics ours.)

And this Court in the case of *Loudon* v. *Taxing District*, 104 U. S., on page 774, held:

"The city took an appeal from that part of the decree which gave the appellant affirmative relief; but that appeal has been dismissed, under the ninth rule, for want of prosecution. The case stands here now as though no such appeal has been taken. *The city can, therefore, only be heard in support of the decree as it stands. This has long been the settled rule in this court. Canter* v. *American and Ocean Insurance Companies,*

3 Pet., 307; *Chittenden* v. *Brewster*, 2 Wall., 191; *The Stephen Morgan*, 94 U. S., 599. *An appeal brings up for review only that which was decided adversely to appellant.* It is unnecessary to determine what might have been done in this case if the appeal of the city had not been formally dismissed for want of prosecution." (Italics ours.)

This Court in the case of *Bolles* v. *Outing Co.*, 175 U. S., page 268, cited with approval the foregoing cases, and held:

"Two other defences are interposed which go to the recovery of even the small judgment of one dollar and costs, and which, if sustained, would require the judgment of the court below to be reversed, and ultimately a verdict for the defendant. First, that the notice of the copyright, imprinted on the photograph, did not fill the requirements of the statute; and, second, that the copyright claimed by Bolles is not sanctioned by the Constitution. *It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below. Canter* v. *American, &c., Ins. Co.*, 3 Pet., 307, 318; *Chittenden* v. *Brewster*, 2 Wall., 191; *The Maria Martin*, 12 Wall., 31, 40; *The Stephen Morgan*, 94 U. S., 599; *Clark* v. *Killian*, 103 U. S., 766; *Loudon* v. *Taxing District*, 104 U. S., 771; *Cherokee Nation* v. *Blackfeather*, 155 U. S., 218." (Italics ours.)

The point in question was also decided by this Court in the case of *Mail Company* v. *Flanders*, 12 Wall., on pages 134 and 135, in which case it was held:

"Probably the decision in the matter of the steamer Iberville was placed upon the ground that the steamer was captured within our military lines subsequent to the publication of the proclamation issued by the commanding general at the headquarters of the army, announcing that 'all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States.'

"Much difficulty, to say the least, would have arisen in sustaining that part of the decree *if the respondents had appealed to this court*, as the presiding justice held that the Circuit Court had no jurisdiction of the case, but inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, cannot be corrected. *Correction of the error is not sought by the appellants, and it is well settled law that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court.* (*The Mary Ford*, 3 Dallas, 198.) *Appellees may be heard in support of the decree, but not for reversal, as it is the privilege of both parties to appeal if they see fit and comply with the conditions prescribed by law.*" Citing *The William Bagaley*, 5 Wall., 412; *Chittenden* v. *Brewster*, 2 Wall., 191; *Harrison* v. *Nixon*, 9 Pet., 484; *Stratton* v. *Jarvis*, 8 *Id.*, 4; *Buckingham* v. *McLean*, 13 How., 150; *Canter* v. *Am. Ins. Co.*, 3 Pet., 318. (Italics ours.)

The foregoing decision was cited with approval by this Court in the case of *Field* v. *Barber Asphalt Company*, 194 U. S., page 621, in the following language:

"If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. *If he fails to take such appeal the correctness of the decision as against him will be presumed.* *Mail Company* v. *Flanders*, 12 Wall., 130; *Chittenden* v. *Brewster*, 2 Wall., 191, 196."

And the rule has been diligently followed by the various Circuit Courts of Appeals.

Pauly Jail Bldg. & Mfg. Co. v. *Hemphill Co.*, 10 C. C. A., 600; *B. & L. Asso.* v. *Logan*, 14 C. C. A., 133-136.

See also:

Clark v. *Killian*, 103 U. S., 766, 769; *U. S.* v. *Blackfeather*, 155 U. S., 180-186.

No decisions in the federal courts in which this rule has been disregarded or doubted have rewarded a diligent search, and the rule has been repeatedly affirmed and uniformly followed for half a century.

Another very strong evidence that the Circuit Court of Appeals did not have before it the question of the deed of trust being given in violation of Sec. 60b, is that the appellees themselves did not even ask for such relief in their brief, nor was any such relief asked for at the oral argument in that Court, but on the contrary, counsel for appellees, in response to a question by one of the Judges presiding in the case made the positive statement at the bar of that court, that he relied entirely upon 67e in having the deed of trust set aside.

No such relief being asked for in the brief of the appellees or at the oral argument, and no cross-appeal having been taken from the ruling of the lower court under that section, we respectfully submit, for the Circuit Court of Appeals now to decide this case and hold the deed of trust in question void under Sec. 60b, was taking your appellant by surprise, and was a great injustice to him. We, therefore, respectfully contend that this court, in view of the fact that the decision of the Circuit Court of Appeals affirming the lower court is based almost entirely upon the fact that the giving of the said deed of trust is in violation of Sec. 60b, should reverse the decree appealed from.

If the appellees had any right to have the deed of trust in question set aside under §60b of the Bankruptcy Act in Circuit Court of Appeals, the same was waived by their failure to take a cross-appeal, and they should

not have been heard to complain of any adverse ruling thereon in the court below. and the Circuit Court of Appeals erred in so considering said question.

FOURTH QUESTION.

Assuming that the Circuit Court of Appeals had a right to decide the third question, although no cross-appeal was taken by the appellees, whether or not its decision in this cause is erroneous in holding that the deed of trust in question is void under Sec. 60b of the bankrupt act?

The reasons given by the Circuit Court of Appeals for holding the deed of trust void under Sec. 60b as an unlawful preference are set out in paragraphs 9 and 10 of its opinion, and appears on pages 141 and 142 of printed record.

With all deference and respect, we most seriously contend that the reasoning and the conclusions drawn therefrom of the Circuit Court of Appeals in holding the deed of trust invalid under Sec. 60b of the Bankrupt Act is unsound and erroneous in law, and is in conflict with the decisions of this Honorable Court and the different Circuit Courts of Appeals as pointed out herein.

It will be observed from a reading of these two paragraphs (9 and 10) of the opinion of the Circuit Court of Appeals, that it concedes that:

"It is true Dean lent the money at the time the mortgage was executed and the principle is settled by the Supreme Court in *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, that the mere knowledge of a lender that the money borrowed is to be applied to an existing debt does not make the security given invalid under Sec. 60b as an unlawful preference or under 67e as a fraud."

And this should have been decisive of this case. However, this well established principle and rule of

law, as laid down by this Honorable Court, in the case of *Van Iderstine* v. *National Discount Co., supra,* the Circuit Court of Appeals refused to follow, because, as stated in its opinion, that Dean's "purpose was to extricate Jones (the bankrupt) from embarrassment by acting with and for him in preferring a pressing debt. In pursuance of this purpose, as agent for the debtor, and in his behalf, he actively participated in satisfying the pressing creditor, and taking up the pressing debt by means of the secured debt to himself. * * * Looking away from the form to the substance, by this participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt, Dean tied himself to the old debt, and the notes given to him must be regarded mere substitution of new papers for the old. Where in such a transaction the lender acts as agent for the creditor the security has been held invalid. (*There is no contention in this case that Dean acted as agent for the creditors who got the money he loaned Jones.*) *In re Beerman*, 112 Fed., 663; *Alexander* v. *Redmond*, 180 Fed. 92; *Walters* v. *Zimmermann*, 208 Fed., 62; *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575. The reason is still stronger for holding it invalid *when the lender acts as agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his (the bankrupt) own benefit.* * * * The deed of trust o Dean must, therefore, be declared void under Section 60b as an unlawful preference." (Italics ours.)

We respectfully submit that there is no allegation in the bill and that there is no evidence or proof in the record in this case that Dean acted as or was the agent of Jones, the bankrupt, or that he participated as such for his benefit in carrying out the alleged plan of preference. Neither the complaint filed in this case, the record, nor the proofs therein justify the conclusion of law reached by the Circuit Court of Appeals that Dean by

his alleged participation as agent of the insolvent debtor in paying the bank and taking up the notes and securing the debt tied himself to the old debt, and that the notes given him must be regarded mere substitution of new papers for the old. There is no such allegation in the complaint, the record does not show such to be the fact, and the proof of the case shows conclusively to the contrary. It was a mere coincidence that Dean was present when the money he loaned the bankrupt was used by the bankrupt's father in paying the bankrupt's indebtedness at the bank. See Dean's uncontradicted testimony on page 107 of the record, answer to question 32. Also see the testimony of the appellee's star witness, J. W. Long, the cashier of the bank who received the money in payment of Jones' indebtedness to the bank, on page 92 of the record, his answers to questions 14 and 15. *Therefore, it is impossible, as it seems to the appellant, that the transaction can be converted from that which it was into something which it was not, in order to bring in the doctrine of a preference under Sec. 60b of the Bankruptcy Act.* (See *Ex Parte Stubbins*, 17 Chancery Division, pp. 67, 68 and 69.)

However, assuming for the sake of argument that Dean did act as the agent of the insolvent in paying the money to the bank for him, yet, if under the decisions of this Honorable Court, and the said Circuit Court of Appeals, a lender may know that the money he loans is to be used in paying a favored creditor or for making a preference, counsel for appellant is at a loss to know why a different inference is to be drawn from the lender's action, because, as the lower court says, he actually participated as the agent of the borrower in carrying out the plan of preference, when such a transaction in itself would have been lawful had the borrower acted for himself in the matter. This very Circuit Court of Appeals in the case of *Crim* v. *Woodford*, 136 Fed., 34, 40 and 41, held a similar transaction law-

ful. We, therefore, respectfully contend that it should have followed in deciding this case its own previous decision, and especially so, because the same is in harmony with the decisions of this Honorable Court in the cases of *Coder* v. *Arts*, 213 U. S., 223, and *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575; and likewise in harmony with the other Circuit Courts of Appeals and other courts, in the cases of *Githens* v. *Shiffler*, 112 Fed., 505, 507; *In re Hersey*, 171 Fed., 1001; *George* v. *Grant*, [illegible]m. (N. Y.), 69, which was affirmed in 97 N. Y., 270; and *In re Baar* (C. C. A., 2nd Ct.), 213 Fed., 629-30, recently decided.

This latter case is on all fours with the case at bar, and for this reason we make the following extended extract therefrom:

"The mortgage was valid under the law of the State of New York against creditors, because it was duly filed in accordance with article 10 of the Lien law (Consol. Laws, N. Y., c. 33). As such it is good against the trustee in bankruptcy under Section 67 (d) of the Bankruptcy Act, unless it was not accepted in good faith or was in fraud of the act. It could not be set aside under section 67 (e) unless it was given and accepted with the intent of hindering, delaying and defrauding creditors. Solomon Baar gave a full present consideration. If he knew or even stipulated that part of the proceeds of the loan should be applied to relieve the corporation of which he was president and his nephew of liability as accommodation indorsers on the bankrupt's notes, there was nothing fraudulent in that. The payment was a preference of the banks, and so of the indorsers; but the bankrupt had at common law and under the statute of Elizabeth a right to prefer any *bona fide* creditor. The trustee could recover the payments under section 60, if the banks receiving them had reasonable cause to believe that they were intended as preferences; but to invalidate the mortgage under Section 67 (e) as a preference is not sufficient. *Actual fraud on the bankrupt's part must be shown. Van Iderstine* v. *National Discount*

Co., 174 Fed., 518, 98 C. C. A., 300; *Coder* v. *Arts*, 213 U. S., 223, 241, 29 Sup. Ct., 436, 53 L. Ed., 772, 16 Am. Cas., 1008.

"No such fraud being shown, the order is reversed."

CREDITORS ONLY MAY BE PREFERRED.

Under Secs. 60a and 60b.

The Circuit Court of Appeals has inadvertently overlooked the fact that in order to constitute a preference, a transfer must be made to a CREDITOR or to some one on his behalf, and this inadvertence is well evidenced by the reason it gives in the tenth paragraph of its opinion for holding the deed of trust in question invalid under Sec. 60b as a preference. We here quote from that part of that opinion, as follows:

"Where in such a transaction the lender acts as agent for the CREDITOR the security has been held invalid. *In re Beerman*, 112 Fed., 663; *Alexander* v. *Redmond*, 180 Fed., 92; *Walters* v. *Zimmerman*, 208 Fed., 62; *Van Iderstine* v. *National Discount Co., supra. The reasoning is still stronger for holding it invalid when the lender acts as the agent of the debtor with the distinct purpose of aiding him to prefer a particular debt for his (the bankrupt) own benefit.*" (Italics ours.)

We respectfully concede the law to be as stated in the first sentence of the preceding paragraph, but we most seriously contend that the law laid down and the reasoning given therefor in the second sentence of the preceding paragraph is erroneous and unsound, as the indispensable pre-requisite of a preference is lacking, viz., a pre-existing creditor. Therefore, there could have been no intent to prefer Dean, nor can there be any recovery from Dean under 60b of the Bankruptcy Act.

"Though the words 'person' and 'creditor' are used interchangeably in this subsection, it is clear that only a creditor can receive a preference. A payment for transfer to anyone other than a creditor, *unless for the latter's benefit*, falls within the remedies indicated in Secs. 67e and 70e. * * * The practitioner, therefore, should at the outset of a suit to recover decide whether the proposed defendant is a creditor or not. Pleading, proof and possibly judgment will depend upon such decision." *Collier on Bankruptcy*, 10th Edition, page 813.

Conceding for the sake of argument, that Dean did act as the agent of the bankrupt with the distinct purpose of aiding him to prefer a particular debt for the bankrupt's own benefit, as stated by the Circuit Court of Appeals, yet this would not make Dean a creditor, and as it is elementary that a transfer can never be a preference unless it is made in consideration of an antecedent debt, the Circuit Court of Appeals erred in holding to the contrary and has, therefore, caused great injustice to your appellant, and in so holding it has caused a contrariety of decisions in this country and England, and therefore its decree should be reversed.

THE DISTRICT COURT HELD THAT DEAN WAS NOT A CREDITOR.

As will appear on page 34 of the record, the District Court ruled that Dean was not a creditor of the bankrupt, R. Crawley Jones, in the following language:

"With regard to the first question, the Court holds that on the 3rd of September, 1909, Claude M. Dean was not a creditor of the bankrupt, R. Crawley Jones. On that day he advanced for the bankrupt, R. Crawley Jones, the sum of $1,600.00 in pursuance and on the faith of an agreement on the part of R. Crawley Jones to give him a mortgage upon all his property to secure re-payment. This was a present valuable consid-

eration, and the mortgage, although actually executed a few days subsequent, was executed in pursuance of a direct promise made in consideration of a present actual sufficient valuable consideration, and upon which the same was based, and was executed under circumstances so nearly in point of time as to be practically contemporaneous with the loan, and in the opinion of this Court it is, therefore, not a mortgage given by way of preference to a pre-existing creditor so far as Claude M. Dean is concerned, but a mortgage given for a present actual valuable consideration." (Record, page 34.)

This ruling of the District Court is ably supported by the following authorities:

"Mortgages have been sustained when given in pursuance of a valid promise made at the time of the loan, where it was shown that the promise was to give specific security and that the promise was given as an inducement upon which the loan was made."

Loveland on Bankruptcy (4th Ed.), p. 952, citing:
In re Jackson Iron Mfg. Co., Fed. Cases No. 7153.
Brudock v. *Jackson*, 15 N. B. R., 318.
Douglass v. *Vogeler*, 6 Fed., 52.
Gattman v. *Honea*, Fed. Cases, No. 5271.
Sabin v. *Camp*, 98 Fed., 974, approved in
Thompson v. *Fairbanks*, 196 U. S., 525.

And the following cases are to the same effect:
Sexton v. *Kessler & Co.*, 172 Fed., 535, 542-5.
Hauslet v. *Harrison*, 105 U. S., 401.
Goodnough M. & S. Co. v. *Galloway*, 156 Fed., 504-510.
In re Wolf, 98 Fed. 84.
Walker v. *Brown*, 165 U. S., 654, 664-5.
Goodnough M. & S. Co. v. *Galloway*, 171 Fed., 940-949.

Judge Boyd, speaking for the Circuit Court of Ap-

peals for this circuit in the case of *Davis* v. *Turner*, 120 Fed., 605, said:

"This would seem to settle the point in question. The previous Bankrupt Act contained, substantially, a provision similar to that in the present law relative to the transfer of property in order to prefer a creditor; but it did not make any exception for transactions based upon present consideration; and yet under that act it was held that, where the debtor in good faith makes a transfer for value given at the time, OR IN PURSUANCE OF AN AGREEMENT MADE WHEN THE CONSIDERATION PASSED, such conveyance WILL NOT be an Act of Bankruptcy."

"Equity looks on things agreed to be done as actually performed." *Goodnough M. & S. Co.* v. *Galloway*, 171 Fed., 940-949.

And it was held by the Circuit Court of Appeals for this circuit in the case of *Tomlinson* v. *Bank*, 145 Fed., 824 (76 C. C. A., 400), as follows:

"That where a bank allowed a customer to overdraw on the express agreement that good accounts should be assigned to the bank for collection to pay overdrafts, the SUBSEQUENT ACTUAL ASSIGNMENT OF THESE ACCOUNTS DID NOT CONSTITUTE THE GIVING OF A PREFERENCE, although at the time of the assignment the customer was INSOLVENT."

LEADING CASE ON THIS POINT.

Acts done under agreement contemplating immediate action and transfer so as to bring the matter within the rule that equity will consider a thing done at the time it ought to be done was passed upon by the Circuit Court of Appeals of this circuit, in a very able opinion by Judge Boyd, in the case of *Mills, Trustee, &c.* v. *Virginia-Carolina Lumber Company*, 90 C. C. A., 154; 164

Fed., 168; 21 L. R. A. (N. S.), p. 901 and note, and this case is now considered the leading case on the subject. The note in this latter case is in part as follows:

"This note is confined to cases where the executory agreement as well as the delivery thereunder was within the four months period.

"The note of necessity does not comprehend cases involving the payment of consideration at the time of the transfer, nor cases involving a contemporaneous exchange of property or securities. As thus narrowed, the cases, while not numerous, afford full support of *Mills* v. *Virginia-Carolina Lumber Co.*, and in the main rest upon the ground that the transfer, although made subsequently to the agreement, is in effect, as if made in consideration of a present consideration, and, therefore, but an exchange of securities which does not amount to a VOIDABLE PREFERENCE."

Then follows a long list of cases. See especially *Douglas* v. *Vogeler*, 6 Fed., 53.

Dean not being a creditor at the time of the giving of the deed of trust, the giving of the same was not a preference and cannot be attacked as such.

This Court in the case of *Stewart* v. *Platt*, 101 U. S., 731, said:

"An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his CREDITORS can only complain if he *waste his estate* or give preference in its disposition to ONE OVER ANOTHER. His dealing will STAND if it leave his estate in as good plight and condition as previous."

"Mortgages given to secure a *bona fide* loan, made at the time is valid, though the proceeds were used in paying some creditors in preference to others, and the mortgagee was cognizant of the insolvency and of the intended preference."

George v. *Grant*, 28 Hun., 69. Affirmed in 97 N. Y., 263.

To uphold the doctrine laid down by the Circuit Court of Appeals, in paragraphs 9 and 10 of its opinion, we respectfully submit, would be dangerous in practice and would create great uncertainty in the transactions of merchants, banks and individuals. It never could have been the intention of congress in enacting the Bankruptcy Act to invalidate securities given to secure a loan made in good faith and without any fraud or collusion on the part of the lender to defeat the statute, simply because the lender knew that the money loaned was to be used to pay debts of the mortgagor. The preference, if any existed in this transaction, resulted from the application of the money after it had been advanced by the mortgagee and received by the mortgagor.

A transfer will not amount to a preference if made contemporaneously with, or before the rising or accrual of, the claim. Preference necessarily implies CREDIT. (Remington on Bankruptcy, §1314.)

If this were not so, it would put an end to legitimate business. No business could be transacted with a merchant or other person from the moment he became embarrassed.

In this connection see *In re Davidson*, 109 Fed., 882, from which Remington takes the following quotation:

"So the question is, can a bank, knowing a merchant is hard pressed, *lend the merchant money with which to pay his debts*, the banker at the time and as part of the same transaction, taking mortgage security and but for which the money would not have been loaned * * * The bank did not receive a preference. Without the mortgage, and in the absence of the supposed right to receive the mortgage, the bank would not have parted

with its money. It is a very different case where one is already a creditor and later insists upon and receives security."

THE BANKS WERE PREFERRED, IF ANY ONE AND NOT DEAN.

And it is shown by the opinion of the Circuit Court of Appeals, at page 56 of the record in this case, that it was the owners of the notes held by the banks who were benefited by the payment of their indebtedness and THEY, if any one, received a preference. Dean received no benefit whatever from the payment by the bankrupt to the banks, and was not and could not have been preferred thereby, for he was not prior to the deed of trust in question a creditor of the bankrupt.

The foregoing contention is well sustained by the opinion of the Circuit Court of Appeals in the case of *Jones* v. *Wright, et al.*, found on page 56 of the record in this case. In which case the Court held as follows:

"That at the time of the filing of the petition he was insolvent and that being so insolvent, he did prefer certain of his creditors *who then held his notes*, which had been theretofore executed for value by him and were then held by the banks in Petersburg, Virginia."

The Circuit Court of Appeals in that case having thus declared the recipients (the banks who received the money loaned by Dean to Jones) of these payments to be preferred creditors, it would seem to have been the duty of the bankrupt's trustee to have pursued these preferred creditors, viz., the banks. But for some reason, best known to himself, he abandoned the road thus pointed out in that opinion. He preferred to take another course, and to pursue the man who loaned the money and took security for such present loan. We can only surmise why this has been done. These directors

whose bank has gotten the money due it on these notes, were also the largest creditors of the bankrupt. They now want their pre-existing debts paid before the money advanced by Dean has been returned, and the trustee is doing what he can to aid them. The trustee has seen fit to let the banks escape, although the Circuit Court of Appeals in the above mentioned opinion has adjudged them to be preferred creditors, but seeks to have Dean's deed set aside as a preference.

This, we have seen, cannot be, because it was not given to secure a pre-existing debt. Nor can it be held to be an unlawful preference because not accepted in good faith. On this point the District Court on page 34 of the record says:

GOOD FAITH.

"That it was taken in good faith in the ordinary acceptation of the terms is evident from the testimony * * * and the opinion of this Court so far as his response is concerned is that the transaction was one in which he manifested perfect good faith."

And the Circuit Court of Appeals in referring to this point in the eleventh paragraph of its opinion says:

"Dean, it is true, had no corrupt motive to benefit himself; on the contrary, he was impelled by a laudable and unselfish impulse to aid his brother-in-law in his troubles, and in the effort actually incurred labor and expense with no gain to himself."

The holding by the Circuit Court of Appeals in paragraph 8 of its opinion that the appeal of one charged with a crime, although he be innocent of such a charge, (for there is not one iota of testimony in this case beyond the fact that there was only a rumor of such charge), is a signification of acute financial distress and notice to the world that one has exhausted his credit

and come to the end of his ability to obtain money in the ordinary course of business, would be, we most respectfully contend, a most extraordinary and dangerous doctrine of law to lay down. For it will be readily seen that any one who should be so unfortunate through spite, blackmail or dislike, as to be charged with a crime, although innocent, would be unable to secure necessary funds for his defence from his own estate, which he has the right to dispose of until taken away by law. It would therefore seem to be a very extravagant extension of the doctrine as to what constitutes insolvency under the bankruptcy law to hold that such an appeal, as the one contained in the letter of Jones to Dean on page 17 of the record, under such circumstances as existed in this case, is of itself a signification of financial distress and notice that one has exhausted his credit. Not a single witness in this case has testified that he believed Jones, the bankrupt, to be insolvent at the time of the loaning of the $1,600 to him by Dean. The uncontradicted testimony of Dean is that he was thoroughly convinced that Jones was in good financial condition, and only needed some ready cash to tide him over his threatened embarrassment and with the loan he would be able to carry on his business and farming without being embarrassed in any way. Record, p. 104, top of page. J. W. Long, the trustee's star witness, testified that he did not know at the time that R. Crawley Jones was insolvent. Record, p. 94, his answer to Question 24. In the bill of complaint the trustee alleges and admits that the bank did not know or have reason to believe at the time these notes were paid that R. Crawley Jones was insolvent. What reason then can be given for claiming that at that time Dean knew or had reason to believe Jones to be insolvent? The bank knew all about Jones' monetary condition, including the rumor that one of the endorsements on the notes was not genuine. Five of their directors were among Jones' largest creditors. If the banks, despite this knowledge, did not have reason-

able ground to believe Jones to be insolvent, the same is yet more true of Dean. Record, pages 94, 104 and 112, answer to question 49.

The bill of complaint nowhere alleges, nor is there any proof in the case, that in accepting security for the fair consideration the said Dean knew that the same was to be used in preferring creditors, or that Dean had any relation or connection with said creditors who got the money he loaned, or that he was in any way their representative, or that there was any collusion or any conspiracy between such creditors and Dean, whereby that was done indirectly which is prohibited by the bankrupt act from being done directly.

The decision of the Circuit Court of Appeals on this question therefore should be reversed because it is in conflict with bankruptcy act as well as in conflict with the decision of this Honorable Court in the cases of *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, and *Coder* v. *Arts*, 213 U. S., 223, and also in conflict with the decisions of its own circuit in the cases of *Crim* v. *Woodford*, 136 Fed., 34.

Davis v. *Turner*, 120 Fed., 605, 613, and
Tomlinson v. *Bank*, 145 Fed., 824.
City Nat'l. Bank v. *Bruce*, 109 Fed., 69.
Mills, Trustee, v. *Va.-Car. Lumber Co.*, 90 C. C. A., 154, 21 L. R. A. (N. S.), 902 and note.

and also in conflict with the following decisions in other circuits:

In re Mahland, 26 Am. Bank. Rep., 81.
In re Davidson, 109 Fed., 882.
In re Soudan Mfg. Co., 113 Fed., 808.
Githens v. *Shiffler*, 112 Fed., 505.
In re Hersey, 171 Fed., 1001.

Grant v. *George*, 97 N. Y., p. 262, 269-70.
In re Clifford, 136 Fed., 475.
In re Baar, 213 Fed., 629-630.
Sabin v. *Camp*, 98 Fed., 974.
Thompson v. *Fairbanks*, 196 U. S., 525.
Sexton v. *Kessler*, 172 Fed., 535, 542-5.
Goodnough M. & S. Co. v. *Galloway*, 156 Fed., 504, 510.
Same v. *Same*, 171 Fed., 940-949.
Douglas v. *Vogeler*, 6 Fed., 53.
Ex parte Stubbins, 17 Chan. Div., pages 67, 68, 69.
In re Maplejack, Ex parte, Caldicott, 4 Chan. Div., 155-6.

FIFTH, SIXTH, SEVENTH AND EIGHTH QUESTIONS.

Whether or not the District Court and the Circuit Court of Appeals erred in holding the deed of trust in question void under Sec. 67e of the bankruptcy act, as having been given with the intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors, and when accepted by the said Dean he was presumed to have known that it was made in contemplation of the provisions of the bankruptcy act, because he was charged with notice of the insolvency of Jones, and his purpose was to extricate Jones from embarrassment by acting with and for him as his agent in preferring a pressing debt?

Assuming that the complainant was entitled to relief under Sec. 67e of the Bankruptcy Act under the prayer for general relief, although no such relief was asked for in his special prayer, yet we respectfully submit that the decision of the Circuit Court of Appeals affirming the decree of the District Court, which held

the deed of trust in question was fraudulent, is erroneous.

An intent to prefer and an intent to hinder, delay and defraud, are different. And surely it does not follow because a debtor, though insolvent, has the intent to secure one creditor he thereby has the intent to hinder, delay or defraud others. If counsel's contention on this point were sound, in none of these United States, irrespective of the Bankrupt Law, could an insolvent debtor secure a creditor, for in all the states there are laws against conveyances made with intent to hinder, delay and defraud creditors.

Upon this branch of the case the Circuit Court of Appeals for the Eighth Circuit in *Coder* v. *Arts*, 152 Fed. 943, 947 (affirmed in 213 U. S. 223), has well said:

> "The contention that the intent to hinder, delay and defraud other creditors must be inferred from the fact that the inevitable effect of the mortgage was to deprive them of the opportunity to collect their claims in full, and from the rule of law that every one is presumed to intend the natural and probable effect of his acts, is not tenable here. It is every intent to hinder, delay or defraud creditors *unlawfully only*, not every intent to hinder or delay them, that avails to avoid a transfer made for a pre-existing debt under Section 67-e. An insolvent debtor until the commencement of proceedings in bankruptcy still has the *jus disponendi* of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or payment is not violative of any of the Acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free

from *actual and intended fraud*, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay and defraud as will make it void or voidable under Section 67-e. Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's property, and to pledge or otherwise dispose of it, is neither an unjust nor unlawful interference with the rights of others and is not within the terms of the statute making void conveyances intended to hinder or delay creditors."

For a proper discussion of these questions paragraph 11 of the opinion of the Circuit Court of Appeals, which is that part of the opinion that relates to the deed of trust in question being fraudulent and void under §67e, is here reprinted in full (but for convenience is divided up into 9 parts), as follows:

"(1) The mortgage is also obnoxious to condemnation under section 67e, as held by the District Judge. We should not attempt to add anything to his convincing decree on this point but for the strong reliance of counsel for appellant on the case of *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, recently decided. That case really holds nothing more than had been previously decided in *Coder* v. *Arts*, 213 U. S., 223, namely, that section 67e applies only to actual fraud as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent.

"(2) But here there was not only knowledge of an intended preference, but actual participation by the len-

der as agent of the borrower and for his benefit in carrying out the plan of preference which it was obvious would result in closing the business of the debtor.

"(3) Actual fraud has a large signification, and embraces any undue advantage taken of another.

"(4) Dean, it is true, had no corrupt motive to benefit himself; on the contrary, he was impelled by a laudable and unselfish impulse to aid his brother-in-law in his troubles, and in the effort actually incurred labor and expense with no gain to himself.

"(5) But the conclusion cannot be escaped that in his generous zeal he lost sight of the rights of the creditors.

"(6) Having the strongest reason to believe Jones insolvent, he took a mortgage of his entire property in order to enable him to prefer one creditor to the exclusion of all others and enforced the mortgage, with the apparent consent of the debtor, by seizure almost at the instant of execution on the maturity of one small note.

"(7) As a reasonable man he must be charged with knowledge that this course would inevitably result in the reduction of the value of the assets of a debtor already insolvent, the payment of his preferred debt and the failure to pay other debts.

"(8) All this was aiding and acting with Jones to compass the preference of one creditor to the exclusion of others—to take undue advantage of other creditors by depriving them of their rights conferred by the Bankrupt law to share equally in the distribution of the assets of an insolvent debtor.

"(9) However innocent Dean may have been of any formed intention to accomplish such a purpose, he must be charged with this purpose and the consequences of his course of conduct, since the administration of justice all men must be charged with intention to produce the results which the exercise of reason would make

perfectly evident as the results to be anticipated. The decree of the District Court must be affirmed with costs against the appellant."

ARGUMENT.

Discussing these parts of that decision, in their numerical order, we respectfully submit our views and contentions as follows:

(1) This portion of that court's opinion, except the first sentence, is entirely in accord with appellant's contention, and is supported by the decisons of this Honorable Court in the case of *Coder* v. *Arts*, 213 U. S., 223, and *Van Iderstine* v. *Discount Company*, 227 U. S., 575, and should have been decisive of this case.

(2) However, this well-established principle and rule of law as laid down by the Supreme Court, the Circuit Court of Appeals refuses to follow, because, as it says, "here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference, which was obvious would result in closing the business of the debtor." The fact that the money loaned would be used in paying the banks, under the circumstances, does not, we respectfully contend, justify the conclusion reached by the Circuit Court of Appeals that such a payment would obviously result in closing the business of the debtor, and it was therefore in error in so holding.

As is well said by Black on Bankruptcy (1914 Ed.), Sec. 459, p. 1002:

> "But where an action to avoid a conveyance or incumbrance is based on the provision of the bankruptcy law which makes such transfers or liens

voidable when made within four months prior to bankruptcy and '*with the intent and purpose to hinder, delay and defraud* his creditors, or any of them, 'an *actual fraudulent purpose* on the part of the debtor is an essential element of the trustee's right of action, and unless it is affirmatively established the transaction must stand good. It is not enough to show that the necessary consequence of the transfer or incumbrance is to hinder, delay or defraud creditors in enforcing their claims, or that it defrauds them in the sense of leaving the debtor insolvent or even penniless, or that the property so disposed of was more in value than the debtor could rightfully withdraw from the reach of his creditors. The statute cannot be read as denouncing any transaction which produces a given result, irrespective of the motive. On the contrary, it is aimed only at such conveyances as would be fraudulent and voidable at common law or under the statute of Elizabeth, and under the bankruptcy act, as in those cases, an *actual fraudulent intent* on the part of the debtor is essential." (Italics ours.)

It is conceded that under the decision in the *Van Iderstine case, supra,* that even if Dean knew that Jones borrowed the money in order to pay off a debt, the transfer would not have been subject to attack by the Trustee, except for the fact that a petition in bankruptcy was filed within four months thereafter. *But it must be kept in mind the institution of such proceedings did not relate back and convert a lawful transfer into a fraudulent conveyance.*

We respectfully submit that there is no allegation in the bill, nor is there any evidence or proof in the record in this case, that Dean acted as or was the agent of Jones, the bankrupt, or that he participated as such for his benefit in carrying out the alleged plan of pref-

erence. The uncontradicted testimony of Dean on this point is found in his answer to question 32 on page 107 of the record, which is as follows: "He (Jones' father) stated to me that his son, R. Crawley Jones, had directed *him* to get the money that I had agreed to loan and had given *him* directions as to the use of the same. He then stated to me that if I had the time that he would be glad if I would go with him to pay the money as directed by his son, which I did." * * * It being a mere coincidence that Dean was present when the money he loaned was used in paying the bankrupt's indebtedness to the bank.

However, if it is not in itself unlawful to prefer, nor fraudulent for one *though insolvent* to borrow in order to use the money in making a preference, how can it be said that such a transaction is made fraudulent just because the borrower acts through an agent in making the preference, when, if he had acted for himself directly, it would not have been fraudulent?

The Circuit Court of Appeals in the case of *Crim* v. *Woodford*, 136 Fed., 34, sustained liens as valid in transactions where the lender acted as agent of the borrower in making preferences. See pages 40 and 41 of this volume as to the liens of Crim and Manown, which decision is in direct conflict with the decision in the case at bar.

For a further and a more conclusive answer to this portion of that court's opinion, we here again quote from page 582 of the decision of this Honorable Court in the *Van Iderstine case, supra*, as follows:

"The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is

malum per se and the other *malum prohibitum*, and then only to the extent that it is forbidden. * * * * *It is, therefore, not in itself unlawful to prefer nor fraudulent for one though insolvent to borrow in order to use the money in making a preference. So even if the Discount Company knew that Fellerman borrowed the money in order to pay off an honest debt, transfer would not have been subject to attack by the Trustee, except for the fact that a petition in bankruptcy was filed within four months thereafter. But the institution of such proceedings did not relate back and convert a lawful transfer into a fraudulent conveyance.*"

"Cases, under the present statute, like *In re Beerman*, 112 Fed., 663, relied on by the trustee, relate to transactions in which the *mortgagee was practically the representative of the preferred creditor* and where, consequently the conveyance was as much subject to attack as though it had been made directly to him. *But here the Discount Company was not a creditor of Fellerman & Son, and had no relation with the persons to whom the money was paid. National Bank of Newport* v. *National Bank of Herkimer*, 225 U. S., 178. The transfer, therefore, was not a preference to the Discount Company and could not be set aside *without proof that it knew that Fellerman not only intended to pay some of his creditors BUT TO DEFRAUD OTHERS.* The difference between the two classes of cases is authoritatively recognized by *Coder* v. *Arts*, 213 U. S., 223, where it was said that 'an attempt to prefer is not to be confounded with an intent to defraud, nor a preferential transfer with a fraudulent one.'" (Italics ours.)

(3, 4 and 5) There is no allegation in the bill of complaint filed in this case, nor is there any proof contained in the record in this case, nor has there been any attempt to prove that Dean had any knowledge of Jones' intent to defraud his creditors, if such was the fact. Without such an allegation and proof that Dean had knowledge of Jones' intent, at the time he loaned the money, to defraud his creditors, we respectfully contend and submit that the deed of trust in question, could

not and should not, under the authority of this Court in the *Van Iderstine case, supra,* be set aside under §67e of the Bankruptcy Act. Even if the language used can be so twisted to show that there are sufficient facts alleged in the bill of complaint to the effect that Jones gave the deed of trust for the purposes of hindering, delaying and defrauding his creditors, yet we respectfully submit that there are no allegations in the bill, nor is there any proof in the record, to the effect that Dean had any knowledge of Jones' intent to defraud his creditors, even if Jones did so intend. The absence of this necessary allegation in the bill is easily accounted for by the fact that the bill of complaint filed in this case was originally, as stated in the opinion of the Circuit Court of Appeals, framed in main reliance upon having the deed of trust set aside under §60b of the Act. In fact, the opinion of that court goes only to the extent of holding that Dean "*acted as the agent of the debtor for the distinct purpose of aiding him to prefer a particular debt.*" (See paragraph 10 of that opinion. Record, p. 142.) Under the bankrupt law one has a right to loan a debtor money, and take security therefor, although knowing the debtor would use the same in paying some of his creditors. *Van Iderstine* v. *Nat. Discount Co., supra; Githens* v. *Shiffler,* 112 Fed., 505, 507; *In re Hersey,* 171 Fed., 1001.

(6, 7, 8) We respectfully call attention to the following quotation from Loveland on Bankruptcy (1912 Ed., p. 950, and cases cited, as follows:

"The fact that the mortgagor was insolvent at the time the mortgage is given, and that the mortgagee knew it, does not effect the validity of a mortgage given in good faith and for a present consideration."

In the case of *Davis* v. *Schwartz,* 155 U. S., on page 640, this Court held:

"The fact that the execution of the mortgages was immediately followed by a delivery of possession of the property, so far from being a badge of fraud, has rather a contrary tendency, and was evidently resorted to to avoid an implication of fraud from the retention of possession by the mortgagor. A prompt and vigorous enforcement of an honest debt is by no means indicative of fraud, and it does not lie in the mouth of the plaintiff, who were themselves taking steps in the same direction as the mortgagees, to cavil at their success."

Again this High Court, on page 639, in the same case, held:

"But where a person, being lawfully indebted to several creditors, makes a mortgage or other conveyance to one for the open and avowed purpose of preferring him, then in the absence of a law of the forum prohibiting preferences, such mortgage or conveyance is valid, though it may operate to bar other creditors from obtaining satisfaction of their debts." * * * *

Stewart v. *Dunham*, 115 U. S., 61; *Estes* v. *Gunter*, 122 U. S., 450; *Smith* v. *Craft*, 123 U. S., 436; *Huntley* v. *Kingman*, 152 U. S., 527; *Southern White Lead Co.* v. *Haas*, 73 Iowa, 399; and cases cited.

This Court in the case of *Coder* v. *Arts*, 213 U. S., 223, 242, said:

"The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and to *deprive others of the means of obtaining payment was not sufficient to avoid a conveyance;* but it was uniformly recognized that acting in good faith, a debtor might thus prefer one or more creditors." (Italics ours.)

The Circuit Court of Appeals in part 4 of this part of its opinion, holds that Dean "had no corrupt motive to benefit himself" in this transaction. (Record, p. 143.)

In Collier on Bankruptcy (9th Ed.), on page 950, it is said:

"Deeds of trusts and other transfers made in good faith to secure present loans, protected under a State statute, are within the protection of clause d of this section (§67) and valid liens." Citing:

Crim v. *Woodford* (C. C. A. 4th Ct.), 136 Fed., 34.
Matter of Alden, 16 Am. B. R., 362.
In re Noel (D. C. Md.), 137 Fed., 694.
Wilder v. *Watts* (D. C. of S. C.), 138 Fed., 426.
In re Clifford, 136 Fed., 475.
In re Randolph (D. C. W. Va.), 26 Am. B. R., 623.

VIRGINIA CASES.

We respectfully call your Honor's attention to the decision of the Court of Appeals of Virginia in the case of *Johnson* v. *Lucas*, 103 Va., p. 36:

"In the absence of statute, State or Federal, forbidding it, an insolvent debtor may, *without the imputation of fraud*, prefer one creditor to another, although the preferred creditor may know that the preference will have the effect of defeating the collection of other debts. This is not *hindering or delaying creditors* within the meaning of the statute against fraudulent conveyances, as they have no right to a priority."

See also *Johnston* v. *Witt Shoe Co.*, 103 Va., p. 611.
Alsop, et al. v. *Catlett, et al.*, 92 Va., p. 364.

"The fact that a deed of trust of all of an insolvent's property, executed to secure part of his creditors, provides for payment of the surplus to the grantor, is not of itself evidence of fraudulent intent."

Harvey v. *Anderson*, 2 Va. Dec., 385; Enc. Dig. Va. & W. Va. Report, vol. 6, p. 590.

"Since a debtor has the right to pay one creditor in preference to another, so he may, *without imputation of fraud*, secure one creditor to prevent another from gaining an advantage."

Williams v. *Lord*, 75 Va., 390; *Johnson* v. *Lucas*, 103 Va., 36, 38; *Lucas* v. *Clafflin*, 76 Va., 269.

"Nothing can be more firmly settled than at common law, apart from the statutes of bankruptcy, a debtor, even in failing circumstances, until his property is specifically bound to the satisfaction of his debts, has an absolute right to dispose of it at his pleasure. He may give an undue preference to a part of his creditors, or even to one, and such preference * * * cannot be treated as a fraud."

Alexander Sav. Inst. v. *Thomas*, 29 Gratt., 483, 490; Va. & W. Va. Dig., p. 590, vol. 6.

"At common law a man, though insolvent, until a lien became fixed in some way on his property, might, *without fraud*, convey or transfer it in trust, and prefer one creditor over another, even though it left no estate to pay other creditors."

Va. & W. Va. Dig., Vol. 6, p. 590; *Skipwith* v. *Cunningham*, 8 Leigh, 271.

It has never been held in Virginia to be a fraud upon the other creditors to pay one creditor to the exclusion of another. The Virginia statute with regard to fraudulent conveyances is copied from that of 13th Elizabeth, and Congress in incorporating into the bankruptcy law the words "to hinder, delay and defraud his creditors" used the same wording and intended the same meaning to attach that has always formerly attached to these words which have been used from time immemorial.

(7) We respectfully submit that the transaction

in question did not result in a reduction of the value of the assets of the debtor, and this is clearly shown by the uncontradicted testimony of Claude M. Dean, which appears on page 107 of the record, in his answers to questions 32 and 33, which are as follows:

"32nd Q. What did you do then? A. He stated to me and his son, R. Crawley Jones, had directed him to get the money that I had agreed to loan and had given him directions as to the use of the same. He then stated to me that if I had the time that he would be glad if I would go with him to pay the money as directed by his son, which I did. He first went by a bank in Petersburg and paid that bank three or four hundred dollars and then we went to the Virginia National Bank, of which Mr. J. W. Long is the cashier, and Mr. J. Samuel Jones paid the notes held by the bank of which Mr. Long is the cashier, amounting to between $1,900.00 and $2,000.00, using the $1,600.00 that I loaned, together with some money he, J. Samuel Jones, had loaned his son to do so.

"33rd Q. And I understand, the net result of the transaction was that the aid of your $1,600.00, something like $2,300.00 of R. Crawley Jones' debts were paid, for which no security was taken except your $1,600.00? A. Yes, sir."

ESTATE MUST BE DIMINISHED.

Collier on Bankruptcy (10th Ed.), on pages 803, says:

"So, also, where the transfer does not diminish the general fund, as where it consists of the giving of a fair security for a present loan * * * no preference results." Citing:

Ernst v. *Mechanics' & Metals Nat. Bank* (C. C. A., 2nd Cir.), 201 Fed., 664; affirmed 231 U. S., 60.

Furth v. *Stahl,* 10 Am. B. R., 442.

In re Sayed, 185 Fed., 962.

EXCHANGE OF VALUES.

In *Cook* v. *Tullis*, 18 Wall., 332, the Supreme Court uses the following language:

"A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the bankruptcy act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealings with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously."

That language was quoted in *Stewart* v. *Platt*, 101 U. S., 818. The same principle may be found announced in *Jaquith* v. *Alden*, 189 U. S., 78.

A mere exchange of one kind of property or security for another of equal value does not constitute a preference.

Remington on Bankruptcy, §§1295, 1320.
In re Noell, 137 Fed., 694.

"A fair exchange is no robbery. Mere exchanges of property and changes in its form, as *likewise transfers of it* for which are received at the same time assets of equal value, do not deplete the estate nor constitue a basis of preference."

Remington on Bankruptcy, §1295.

"Some portion of the debtor's property must have been appropriated by the transaction, and the insolvent's estate thereby diminished. Preference implies appropriation of assets and depletion of the trust fund thereby."

Remington on Bankruptcy, §1278.

In re Hawks, 30 Am. Bank Rep., 373, it was held as follows:

"This leaves for determination the main question in issue—whether the evidence establishes fraud on the part of the Commission Company, in aiding the bankrupt to fraudulently obtain credit for the purchase of merchandise, whereby the Commission Company would finally be benefitted in the collection of the indebtedness due it.

"There are certain well-settled rules of law to guide the courts in the determination of such an isssue. If the circumstances proven are just as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is unwarranted. *U. S. Fidelity & Guar. Co.* v. *Des Moines Nat. Bank*, 145 Fed., 373, 74 C. C. A., 553. To establish fraud, the proof must be clear, unequivocal, and convincing. *Jones* v. *Simpson*, 116 U. S., 609; *Thorwegan* v. *King*, 111 U. S., 549; *Walker* v. *Collins*, 59 Fed., 70; *Foster* v. *McAlester*, 114 Fed., 145; *Schagun* v. *Scott Mfg. Co.*, 162 Fed., 209. Proofs which only create suspicion are not sufficient to warrant a finding of fraud. *United States* v. *Hancock*, 133 U. S., 193. A mere preponderance of evidence, which at the same time is vague or ambiguous, is not sufficient to warrant a finding of fraud. *Lalone* v. *United States*, 164 U. S., 255."

NINTH QUESTION.

Whether or not a deed of trust given by one merely charged with a crime to secure a present loan, the proceeds of which are to be used in paying certain of his creditors to extricate himself

Supreme Court of the United States.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE, ET AL., APPELLEES.

THE PRESENT BANKRUPTCY LAW DOES NOT IMPOSE PENALTIES AND THEREFORE THE BANKRUPTCY COURTS HAVE NO POWER TO INFLICT THEM.

It is claimed that the deed of trust in question was given in fraud of the bankruptcy act because it is said that Dean, as agent of the bankrupt, secured the evidence of the indebtedness,—the notes on which it was rumored one of the endorsements was forged. The learned judges of both the District and the Circuit Court of Appeals have assumed the guilt of R. Crawley Jones of the offense concerning which there was no proof and have further presumed without evidence that there was an unlawful agreement on the part of Dean to get possession of the evidence of Jones' assumed guilt and to suppress it. They overlooked the fact that the money was used to pay an honest debt, even though the evidence of the debt may have been dishonest and criminal. These learned judges further hold that this assumed result of

Dean's conduct is in fraud of the bankruptcy act and that Dean should be penalized for what, in every other respect, was a perfectly valid transaction under the decisions of this Court, by having his deed declared to be a fraudulent deed. But we submit there is nothing in the bankruptcy law that authorizes the imposition of such a penalty for a transaction otherwise valid. The sole object of the bankrupt law is equality of distribution. This object this Court has repeatedly said is not interfered with by loaning money to a debtor and taking security therefor, even though the lender knows that the borrower is insolvent and intends to use the fund to prefer some one or more of his creditors. If, in preferring such an honest debt with the money, the debtor receives the evidence of such indebtedness about the legality of which there is a uestionable rumor, can the lender be punished and penalized by having his deed, for that reason, declared void? In short, is the bankrupt act an act for the punishment of supposed crime or of condoning a felony or at least of suspected suppression of evidence of the crime? Certainly, there is nothing in the bankruptcy act that lends itself to this view of imposing a penalty upon Dean for his supposed abetting Jones in the recovery of evidence of his crime. Such penalty or punishment, if any, belongs to another jurisdiction and tribunal, and there is nothing in the bankruptcy statute which allows the imposition of such a penalty. Yet this is the effect of holding, as do Judges Woods and Smith, that, because Dean, it is claimed by them, aided Jones in securing this assumed evidence of crime, the bankruptcy court must penalize Dean for his alleged unlawful conduct by declaring the deed of trust given him to be fraudulent. Such a construction of the bankrupt law is opposed to its sole object and finds no basis in any of its provisions.

No such penalty is imposed by the bankruptcy act, and therefore none can be imposed because the evi-

dence of the debt may have had forged endorsements thereon, since the bankruptcy law is not a statute for imposing penalties, but simply and solely for the equal distribution of the property of the bankrupt. If the act of Dean is such as should be penalized it must be done in some other court and under some law other than that of the bankruptcy law.

On this point, this Honorable Court, in the case of *Keppel* vs. *Tiffin Savings Bank*, 197 U. S., 356, held on page 363, as follows:

"It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt and thus suffer no other loss than the costs of litigation. *The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them.*" (Italics ours.)

from the embarrassment of the charge, is valid under the bankruptcy act, even though the grantor is insolvent, and the lender knows that the money he is loaning is to be so used?

AS TO THE ALLEGED FORCED ENDORSEMENT.

Much stress is laid by the learned Judge, who prepared the opinion of the Circuit Court of Appeals, upon the letter Dean received from Jones relative to his being charged with an offense. The proof in this case only shows that there was a mere rumor that one of the endorsements on the notes was not genuine. (Record, p. 103.) R. Crawley Jones' anxiety regarding this criminal charge is no proof of guilt, for, as he well says, the disgrace of the charge would always cling to his family whether he were innocent or not. But even if we assume that such endorsement was actually forged by Jones, yet we submit, the use of the money obtained from Dean, to pay these notes along with others, cannot affect the legality of the security taken by Dean. The money raised on the alleged forged notes, as far as this record shows, was used in the business of the bankrupt, and hence was a valid debt against him. See *Peters* v. *Bain*, 133 U. S., 670, 679, 686.

The facts in the case at bar and those in the cases of *Ex parte Stubbins*, 17 Ch. Div. (L. R., 1881), p. 67-9, and *Ex parte Caldecott*, 4 Ch. Div. (L. R., 1876), p. 155 and 156, are so similar, and the decisions in these cases are so decisive of this case, that for the convenience of the court, we here print the same at length, as follows:

Ex Parte Stubbins.

17 Chancery Division, pp. 67, 68 and 69.

James, L. J.:

"The facts of the case are few and not in dispute. The debtor applied to the Appellant and offered to sell him a large quantity of goods, amounting in value to £2,050. The Appellant was reluctant to buy them, but to induce him to make the purchase the debtor communicated to him that he was in great difficulties, as he appears in fact to have been, his bankers having refused him any further credit, and also that he had misappropriated trust moneys belonging to a trust estate of which he and the Appellant were trustees, and he told him in effect that he wanted to sell the goods in order to raise the money to make good that defalcation. Thereupon the appellant was minded to make the purchase, and he agreed to make it at a price to be fixed by means of samples which were to be sent to a London broker, who was to fix the proper trade price for them. This being agreed to, the money was paid to the debtor, who, with the knowledge of the purchaser, immediately went to a bank in which there was a joint trust account in the names of the trustees, and paid the purchase-money to the trust account, so as to make good his defalcation. The goods were delivered in pursuance of the contract. The particular goods, the subject matter of the contract at that time, did not, as it turned out, amount in value to the purchase-money paid, but an additional quantity was subsequently added to make up the value. After the bankruptcy, which did not take place until two months after this transaction, the trustee having investigated the matter, applied to the County Court for an order directed against the trust estate, that is, against both the trustees as representing the trust estate, to restore the money which had been so paid to the bankers to the trust account. Upon hearing before the County Judge he was not persuaded to accede to the application in the form in which it was made; he declined to make any order against the trust estate as such, but he found his way to make an order against one of the two trustees, that is, against Mr. Gaunt, the purchaser, on the ground of a voluntary preference. He worked it out in this way—he considered that the £2,050, which was paid under the circumstances which I have mentioned, was a loan from the one trustee to the other to

enable him to make good the defalcation, and that then the goods were delivered by way of voluntary preference in satisfaction of the debt which had been so created. The Chief Judge was of opinion that this view of the transaction could not be sustained, that, whether it could or could not be impeached upon other grounds, it would be impossible to convert that, which was really a payment in respect of goods to be delivered, into a loan, and then to treat the delivery of the goods as a payment or satisfaction of that loan. *In that view I entirely concur. It is impossible, as it seems to me, that the transaction can be converted from that which it was into something which it was not, in order to bring in the doctrine of voluntary preference.* And in truth the view of the case was abandoned upon the argument of the appeal before us; it was admitted by the Appellant's counsel that they could not sustain it. But it was pressed upon us that the order of the County Court Judge could be sustained on the ground that the sale was itself a fraudulent transfer, that is, that the transfer of goods to a purchaser for value with the view of using the purchase-money for a voluntary preference, the purchaser knowing this intention, was a fraudulent conveyance or transfer within the meaning of the 6th section of the Act. It appears to me that that view cannot be sustained. *In truth, a mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, has never been held to be in itself a fraud,* or an act of bankruptcy. It may be impeached on the ground that it is voluntary, but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud. *And, if that is not fraudulent within any principle of law, it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase-money for the purpose of making a voluntary preference, and the purchaser knows that that is the motive of the sale and the intention of the vendor with respect to the proceeds of the sale. It appears to me that it would be an extravagant extension of the doctrine of fraud on the bankruptcy law to hold that such a sale under such circumstances is of itself a fraudulent act or an act of bankruptcy.*

"It was then contended that the appellant might

fall back on the original form of the application to the County Court Judge, for an order against the trust estate as such to restore the money which had been paid to the credit of the two trustees in the banking account of the trust estate, on the ground that that payment was a voluntary preference of the trust estate. It appears to me that that view also cannot be sustained. In truth the County Court Judge declined to accept it, and he must be considered to have dismissed the application so far as it was based upon any such view, and there has been no appeal from his decision in respect of that, and we have not really before us now any persons representing the trust estate. This might be sufficient to dispose of the application in that point of view. But I am of opinion that the County Court Judge was right, and that it is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods by a debtor to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor at all. If a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anybody else, and does restore the money, it seems to me impossible to hold that such a payment can be treated as a fraudulent preference of a creditor."

Brett and Cotton, LJJ., concurred. (Italics ours.)

In re Mapleback, Ex Parte Caldecott.

4 Chancery Division, 155 and 156.

James L. J., delivered the judgment of the court (James, L. J., Baggallay, J. A., and Bramwell, J. A.), as follows:

"The Appellant complains of an order of the Chief Judge by which he was ordered to pay to the trustee of the bankrupt the produce of certain goods seized and sold by him.

"They were so seized and sold under a bill of sale duly registered by which the goods had been assigned.

"The consideration for the bill of sale was £100

then advanced, and £100 previously due. It is not questioned that the £100 was so previously due, and that there was re[illegible]and truly advanced the further sum of £100.

"The right of the Appellant, which on this short statement of facts would seem unquestionable, is impeached on the following ground: Before advancing the second £100 the lender had received from the bankrupt a letter in the most piteous terms, informing him that a bill was becoming due at a banker's which bore the signature, forged, of the lender, and that the bank would, on dishonour of the bill, of course, apply them to the latter, which would lead to a discovery of the crime with all its consequences of punishment to the forger, and ruin to himself and family. In the same letter he offered, if the advance were made, to give a security as well for that as the previous debt. Moved by this letter, the Appellant lent the money, which was applied in taking up the bill, and the security was given, as promised, for that advance and the previous debt. The Chief Judge was of opinion that the lending of the money under those circumstances was such a violation of public policy as to taint and avoid the whole security, and to make it impossible to allow the appellant to retain the proceeds of it, although actually realized and received by him. If the appellant had been plaintiff or claimant, he certainly would have been in a very difficult position. It was not compounding a felony; it might perhaps not have been strictly a misprison of felony, but it was a transaction which was intended to result, and did result, in preventing the discovery of a felony, and getting into the criminal's own hands the most important piece of evidence. It is, however, not necessary to express any actual judgment on how the case would have stood if the appellant had been plaintiff.

"But there is another consideration which appears to us sufficient to dispose of this case. If there was a legal misdemeanor, the bankrupt was a party to it. *In pari delicto, potior est conditio possidentis aut defendantis.* The bankrupt could not have recovered back the proceeds of the sale of the goods, and his trustee cannot be in a better position than the bankrupt. If the bankrupt had repaid the loan the trustee could not recover it. If the bankrupt had actually given money as a

bribe, or parted with property for any other illegal purpose, his trustee could not recover it back any more than he could himself. This is not one of the cases in which the trustee in bankruptcy stands in a better position than the bankrupt. *For, however wrong the transaction may have been in law, it was no wrong against the bankrupt law; there was nothing done with intent to delay or defeat creditors, or to defraud any one.* For all purposes of the bankrupt law, the bill of sale was a bill of sale for a past debt, and a sufficient present advance. And except where there is an offense against the bankrupt law, or against some law in favor of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt, and no other.

"The order of the Chief Judge was accordingly discharged." (Italics ours.)

The above case is cited with approval in the case of *Githens* v. *Shiffler*, 112 Fed., 505-507, and *Githens* v. *Shiffler* is cited with approval by the Supreme Court in *Coder* v. *Arts*, 213 U. S., pp. 223-241.

And the same doctrine is followed by the Supreme Court in *Tiffany* v. *Boatman's Institute*, 18 Wall., p. 388-9. In this case the Supreme Court said:

"In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor policy of the Bankrupt Act are violated if these collaterals be taken at the time the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing this does he prefer one creditor over another, which is one of the great objects of the bankrupt law to prevent. The preference at which this law is directed can only arise in case of *an antecedent debt*. To secure such a debt would be a fraud on the act, as it would work an unequal distribution of the bankrupt's property, and, therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred if the debtor had a good reason to believe the debtor to be insolvent. But

the giving of securities when the debt is created is *not* within the law, and if the transaction is free from FRAUD IN FACT, the party who loans the money can retain them until the debt is paid. In the administration of the bankrupt law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, *no matter what his condition may be*, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect." (Italics ours.) See *In re Busby*, 124 Fed., 469.

The decision of both the Circuit Court of Appeals and the District Court on this question is, therefore, under the foregoing authorities, in conflict with the Bankruptcy Law, the decisions of this Honorable Court, the various Circuit Courts af Appeals, those of its own circuit, and the Bankruptcy Courts of England, and being clearly erroneous should be reversed.

In conclusion we insist that the deed of trust was given and accepted in entire good faith and not in contemplation of or in fraud upon the Bankruptcy Law, and that it is valid within both letter and spirit of the law, and therefore we respectfully ask that the decree of the Circuit Court of Appeals for the Fourth Circuit and that of the District Court for the Eastern District of Virginia be reversed with costs to your appellant, and the cause be remanded to the said District Court with instructions to that Court to direct the appellees to pay over to your appellant the said sum of $1,634.00 (the amount representing the net proceeds of the property embraced in the said deed of trust in question) with interest thereon, and to dismiss the bill of complaint.

Respectfully submitted,

WYNDHAM R. MEREDITH,
C. V. MEREDITH,
Counsel for Appellant.

March 20, 1916.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, AND W. P. WELLS, SUBSTITUTED TRUSTEE,
APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF OF APPELLANT.

Appellees on page 40 of their main brief virtually concede that the Circuit Court of Appeals was without authority to hold the deed of trust in question invalid as an illegal preference under Section 60-b of the Bankruptcy Act. This concession is in harmony with the position taken by counsel for the appellees in the oral argument of said cause in the Circuit Court of Appeals. At this argument counsel for appellees, in response to

a question by one of the Judges sitting in the case there, made the positive statement at the bar of that court, that he relied entirely upon 67-e in having the deed of trust set aside. Therefore it would seem the THIRD and FOURTH QUESTIONS involved in this case for the determination of this Court, and covered by assignment of errors 3, 5, 6, 7, 9, 10 and 15, are eliminated by the admission of counsel for the appellees, and the error of the Circuit Court of Appeals in holding the deed of trust invalid under Sec. 60-b admitted and conceded.

REPLY TO ARGUMENT ON MOTION OF APPELLEES TO DISMISS APPEAL.

The first eleven pages of the Appellees' main brief is devoted to their motion to dismiss the appeal in this case on the ground that because, in entering a decree directing that the funds, realized from the sale of the property mentioned in the deed of trust, be deposited to the credit of that court *In the matter of R. Crawley Jones, bankrupt,* in the Planters National Bank, the designated depositary for bankruptcy funds, the District Court added thereto a clause allowing the appellant's claim as a general creditor or as an unsecured debt, upon having its attention called by the said Dean to an agreement between counsel for the appellees and himself that, in case the UNITED STATES COURTS should declare the deed of trust invalid, the Appellant should have the right to share as a general creditor.

We respectfully submit, that such action on the part of the said District Court cannot be considered on the part of Dean as a waiver of his said security, the validity of which he is now contesting in this appeal in this Court; nor is he estopped thereby from questioning in this Court the correctness of the decree of the Circuit Court

of Appeals appealed from, since his right to share as a general creditor was, by the expressed terms of the agreement, to which the Court's attention was called, only in the event this Court as well as the other UNITED STATES COURTS were to hold his deed invalid.

The allowance of Dean's claim as a general creditor in the bankruptcy proceedings because of the above described agreement between counsel for appellees and the appellant is certainly not a waiver, either expressed or implied, of his right of appeal to this Court in this independent suit; nor is it an admission that the decree he seeks to reverse in this suit is not erroneous; nor does such an entry take from the appellees anything, on the reversal of the decree, to which otherwise they would be entitled, for they cannot deny that this sum allowed him as a general creditor at least is due and payable out of the fund to him.

Page v. *Rogers*, 211 U. S., 575-581;
Keppel v. *Savings Bank*, 197 U. S., 356.

This Honorable Court, in the case of *United States* v. *Dashiel*, 3 Wall., on page 697, held:

> "Where a writ of error is taken to the appellate Court by a plaintiff below who previously to taking the writ of error issues execution below and gets a partial but not a complete satisfaction on his judgment, the writ of error will not, in consequence of such execution merely, be dismissed."

In the case of *Erwin* v. *Lowry*, 7 Howard, 184, the amount of the judgment was paid to the sheriff in August, and paid by the sheriff to the creditor and appellant Erwin in November, 1844. The writ of error was sued out in May, 1845, and there accompanied the record an assignment of errors. The defendant asked to have the

writ of error dismissed on the production of a copy of Erwin's receipts to the sheriff, on the ground that by receiving the money, Erwin released the errors complained of.

The court held that the motion came too late to be heard, but that if it could be heard it was no bar. This Honorable Court said:

> " * * * Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many of the cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed . . . it is the duty of the inferior court . . . . to restore the parties to their rights."

The industrious counsel for the appellees have presented to the court no authorities to support his motion. There are none based on sound principles of justice.

ALL PARTIES ARE IN *STATU QUO.*

No dividends have been paid to any of the creditors of the bankrupt, nor has the position of any of the creditors changed because of the action of the District Court in allowing the claim of Dean as a general creditor. So far as the creditors in this case are concerned matters are in *statu quo.* In fact, the District Court, acting upon the motion of counsel for the appellees, has positively refused to permit a distribution of the fund pending this appeal. (See Appellant's Answer on Motion to Dismiss, page 4.) The fund has been, upon the motion of counsel for the appellees here, recently re-deposited so as to bear interest during the pendency of

this appeal. The fund, therefore, is bearing interest and is being held at the direction of the District Court to await the decision of this Honorable Court in this appeal. The foregoing facts conclusively show that the decision of this Court will be respected, put into effect and carried out; and further show that the said District Court itself does not even construe the clause put in its decree allowing Dean's claim as a general creditor to be a waiver of his said security. Hence, we respectfully submit that the appeal in this case does not present a *moot question,* as he contends, nor is your appellant thereby estopped from prosecuting his said appeal.

To grant the appellees' motion to dismiss this appeal upon the grounds set out in their motion and brief in support of same, under the circumstances of this case, would be a great miscarriage of justice, and would be to permit lower courts to put upon litigants terms of constraint which would operate under the shadow of their necessities to deprive them of the right to bring their causes to this the tribunal of last resort established by the constitution of the United States for the correction of errors.

To do so might, and doubtless would, operate in many cases, as it would in this, in a hardship and oppression upon those most dependent upon the courts of the country for their protection. In this particular case, as will be seen by the agreement (Record, page 15) entered into between counsel for the appellees and the appellant, it was mutually agreed and understood that the validity of the said deed of trust in question was to be contested in ALL THE UNITED STATES COURTS and the fund, representing the proceeds from the sale of the property mentioned in the deed of trust, was to be held until *all of the said United States Courts* had

passed upon the validity of said deed of trust, and there was certainly no agreement or understanding of compromise by which it was agreed to release errors, and we think there is no rule of law which effects that end.

Surely the error of counsel for the appellees, in presuming that the denial of the petition for a writ of *certiorari* in this case was equivalent to an affirmance of the decree now sought to be reviewed, will not be permitted to deprive the appellant of his legal rights to prosecute this appeal, just because on account of this error the appellees' counsel prematurely applied to the District Court to have the fund distributed and thereby caused the District Court to prematurely enter the order allowing your appellant to share therein as a general creditor.

Hamilton Shoe Co. v. *Wolf Brothers,* 240 U. S., 252.

The Supreme Court of Virginia in the case of the *Southern Railway Co.* v. *Glenn,* 98 Va., pages 318 and 319, in passing upon a question similar to the one involved in the motion to dismiss, said:

> "It is further insisted that the appellants have lost their right of appeal because Mr. Howard, their counsel, agreed that, notwithstanding the fact that he differed with the court as to its power to allow the trustee additional compensation, he would not contest the matter. It is true, Mr. Howard, does state in his deposition that he did not appeal from the court's action allowing such compensation, because he wished the trustee to be fully compensated. Such a statement as this is clearly no such agreement as would prevent the appellants from appealing. There is no pretence that there was any consideration for it. Even if the appellants themselves had told the trustee that they did not intend to, and would not, appeal, it would not

have prevented them from appealing, unless there had been a consideration for it, or the trustee had acted upon such statement to his prejudice, and of this there is no evidence.

"The fact that the appellants received the several sums decreed them from collections made by the trustee was not, as appelleee insists, a waiver of their right of appeal as the sums allowed the trustee as additional compensation for his services. Where a decree is entered for less than the party claims, receiving payment of the sum so decreed is not a waiver of errors, nor does it estop him from appealing from the decree, so far as it does not allow him what he claimed. *Morris* v. *Garland, &c.*, 78 Va., 215; *Embrey* v. *Palmer*, 107 U. S., 3."

APPELLANT HAS NEVER FILED A CLAIM TO HAVE HIS DEBT ALLOWED AS AN UNSECURED CREDITOR.

The counsel for the appellees is in error in his statement made on page 2 of his motion to dismiss, and on page 4 of his brief in support of motion, as well as on page 11 of his main brief, that the appellant filed his claim as an unsecured creditor. If there is any question as to this, counsel for appellees is challenged to produce same or a certified copy thereof.

Under the foregoing facts and authorities we respectfully ask that the motion to dismiss this appeal be denied.

On the motion to dismiss, in conclusion we wish only to say, that if the entry of the clause in decree of the District Court allowing the claim as a general creditor can in the remotest way be considered a waiver of the appellant's security, then we wish to call this Honorable Court's attention to the fact that the appellant has, as a matter of precaution, applied by petition to the District Court for permission to withdraw the same and

asked that said clause be stricken out of its said decree. A copy of which petition is filed with the Clerk of this Court. Such a procedure being approved and allowed in the following cases: *In re Weaver,* 144 Fed., 299; *In re Wilder,* 101 Fed., 104; *In re Falls City Shirt Mfg. Co.,* 98 Fed., 592; *In re Friedman,* 1 Nat. Bankr. News, 208; *In re Richard,* 94 Fed., 633; *In re Bear,* 8 Fed., 429; *In re Van Buren,* 2 Fed., 643; *In re Brand,* 2nd Hughes, 334; Fed. Cases No. 1809; *Ex parte Harwood,* Crabbe, 496 Fed. Cas. No. 6185; *In re McConnell,* Fed. Cas. No. 8712; *Ex parte Latsley,* Fed. Cas. No. 8083; *Phillips* v. *Bowdoin,* 52 Ga., 544, 14 N. B. R., 43. Black on Bankruptcy (2nd Ed.), Sec. 563, p. 1190.

Mr. Black, in his excellent book on Bankruptcy, in commenting on this question, in Sec. 563, says:

> "If a secured creditor proves his claim as unsecured, but does so through mistake or inadvertence or ignorance of his legal rights, and without being aware of the effect which such a course may have as a waiver or abandonment of a security, he should not be compelled to forego the benefit of the security and participate as a general creditor, but it is in the discretion of the court to permit him to withdraw his proof and rely upon the security, or to amend the proof by stating the fact and the particulars of the security, and this permission will ordinarily be granted where no fraud appears and no one else will be prejudiced in his rights."

Remington Bankruptcy, at Sec. 623, says:

> "The right of withdrawal is an absolute right of the claimant and is not subject to the discretion of the court."

In *In re Stewart,* 178 Fed., 463, it is held:

> "I do not think it within the power of the Court, or referee, to prevent such withdrawal or abandon-

ment of the claim presented. The withdrawal is a matter of right in the creditor and not a matter of discretion with the referee or judge."

WHY THE EVIDENCE IN THIS CASE SHOULD BE REVIEWED IN DETAIL.

While well aware of the rule established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown, we respectfully submit that in view of the fact that the testimony in this case was taken entirely before a notary public, and though the District Court did make a finding of facts the Circuit Court of Appeals did not, yet the findings made by the District Court we most seriously contend were influenced by erroneous views of the law, and therefore this Honorable Court should not accept those findings, but should review the evidence in detail.

Page v. *Rogers, Trustee*, 211 U. S., 575-577-578.

AS TO DEAN HAVING A REASONABLE CAUSE TO BELIEVE JONES INSOLVENT.

If counsel for appellees, who has been such since the beginning of this suit, did not believe Jones insolvent at the time of the giving of the deed of trust in question, and the cashier of the bank that received the money loaned and who knew all about Jones' financial affairs, says he did not know he was insolvent at the time, how can it be seriously contended that Dean had a reasonable cause to believe Jones insolvent at the time he loaned the money and took the deed of trust as a security therefor?

The record and proofs in this case shows that Bartlett Roper, Esq., who is the present counsel for the ap-

pellees, and has been such since the beginning of this suit, and is most familiar with every detail in connection therewith, did not consider R. Crawley Jones insolvent even as late as September 21, 1909. On that day the record in this case shows he prepared and obtained from R. Crawley Jones to himself and others a second deed of trust on all of the same property, goods, &c., set out and contained in the deed of trust from the said Jones to the said Dean, and the trustee therein was directed to withhold the sum of $1,600 due the appellant, and "distribute the balance pro rata and without priority or preference among the unsecured creditors of the said R. Crawley Jones." This deed of trust was put in evidence by the counsel for appellees and is referred to on page 121 of the printed record. However, by agreement of counsel the same is not printed in full in the record, but the original thereof is certified up as an original exhibit "C. M. D. No. 7." Can it therefore be seriously said that Mr. Roper believed Jones insolvent at that time, as he now contends? If so, why was he so active in securing and taking a second deed of trust on this identical property from Jones? There is but one answer, and that is, that he, like Dean and the Cashier of the Bank, who knew all about the financial affairs of Jones, did not believe Jones was insolvent at that time. If Counsel for the appellees and the Cashier of the Bank, and Jones' father did not believe R. Crawley Jones was insolvent at that time, how can it be said that Dean had a reasonable cause to believe him insolvent? In fact, every one concerned or interested in the matter at that time were so certain of Jones' solvency it was agreed that the Trustee should not sell the furniture of Jones until everything else had been disposed of. They thought the other assets would sell for sufficient and it would not be necessary to dispose of his furniture. (Record, page 29.)

In fact the record shows not a single witness has testified in this case that he believed R. Crawley Jones to be insolvent at the time.

ADDITIONAL AUTHORITY IN SUPPORT OF APPELLANT'S CONTENTION THAT THE DEMURRER SHOULD HAVE BEEN SUSTAINED AND THAT THE DEED OF TRUST IS NOT FRAUDULENT AND VOID UNDER SEC. 67-e.

In the case of *Traders' National Bank* v. *Steers, et al.*, 165 Mass., 389, the Supreme Court of Massachusetts, approves the doctrine and principle of law laid down by the Lord Justices of England in the case of *In re Maplebach, Ex parte Caldecott*, 4 Chan. Div., 150, 155-6, cited by Appellant, on page 64 of his main brief, in support of his contention that the giving of the deed of trust in question was not a fraud upon the creditors of Jones, nor a fraud against the bankruptcy law.

In this case of the *Traders' National Bank* v. *Steers, et al., supra*, the defendants demurred to the bill and assigned as a ground therefor *that there was no sufficient allegation of fraud.* At the hearing in the lower court, the demurrer was sustained, and the bill dismissed, and the ruling of the lower court was sustained by the Supreme Court of Massachusetts. The facts in that case grew out of a transaction somewhat similar to the one in this case and the allegations of the bill were similar to those in the bill in this case.

REPLY TO ARGUMENT OF APPELLEES THAT THE DEED OF TRUST IN QUESTION IS INVALID UNDED SEC. 67-e OF THE BANKRUPTCY ACT AND COMMENT ON THE AUTHORITIES CITED BY APPELLEES.

Counsel on page 22 of his main brief, in support of his contention that the deed of trust is invalid under Sec. 67-e of the Bankruptcy Act, states as follows:

"We will now consider briefly the law bearing on the facts as disclosed by the record, and see what has been the ruling of the courts in cases involving a similar state of facts.

"Under the act of 1867 all transfers out of the due course of trade were *prima facie* evidence of fraud and the same rule applies under the Act of 1898."

And in support of this contention he cites the cases of *Walburn* v. *Babbitt,* 16 Wall., 577; *In re Knof,* 146 Fed., 109, and *Dokken* v. *Page* (C. C. A., 8th Ct.), 147 Fed., 438.

The learned counsel for appellees is evidently not aware that the Circuit Court of Appeals for the Eighth Circuit, which Court rendered the decision in the above cited case of *Dokken* v. *Page, supra,* has since the decision in that case, overruled the contention of the appellees and qualified its former decision, as will be seen from the following extract taken from an opinion of that court, which it rendered in the case of *Houck* v. *Christy,* 152 Fed., 615, which is in the following language:

"We have not failed to consider the appellant's contention that this case is necessarily ruled by *Walburn* v. *Babbitt,* 16 Wall., 577, 21 L. Ed., 489, where it was held that a sale, assignment, transfer, or conveyance made out of the usual and ordinary course of business of the debtor, as a sale by a retail merchant of his entire stock of goods, is, without more, *prima facie* fraudulent, and puts upon the vendee the burden of proving that he purchased in good faith. But, as that decision turned upon the provision in the former bankruptcy act, 'and if such sale, assignment, transfer, or other conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud,' and as the present act contains no such provision, we do not assent to the contention. In the absence of such a statutory provision,

the fact that a sale, assignment, transfer, or conveyance is made out of the usual and ordinary course of business does not, without more, render it *prima facie* fraudulent; but it may be a badge of fraud, of little or considerable influence, depending upon the surrounding facts. 2 Bigelow on Fraud, p. 439; Bump on Fraudulent Conveyances (4th Ed.), Sec. 47; 20 Cyc., 485; *Bigelow* v. *Doolittle*, 36 Wis., 115; *Sexton* v. *Wheaton*, 8 Wheat., 229, 250, 5 L. Ed., 603;

"It may be that, in the recent case of *Dokken* v. *Page* (C. C. A.), 147 Fed., 438, involving a sale by a retail merchant of his entire stock of goods, WE GAVE UNDUE PROMINENCE TO THE LANGUAGE OF THE COURT IN *WALBURN* v. *BABBITT;* BUT IT WAS NOT OUR INTENTION TO SAY THAT THE FACT THAT THE SALE WAS OUT OF THE USUAL AND ORDINARY COURSE OF BUSINESS WAS, WHEN TAKEN ALONE, *PRIMA FACIE* EVIDENCE OF FRAUD UNDER THE PRESENT ACT, but only that it was a circumstance which, in connection with the surrounding facts disclosed in the opinion, vitiated the sale there under consideration." (Italics ours.)

From the foregoing decision it will be seen that the learned counsel for the appellees is in error in his contention and statement that the same rule applies under the act of 1898 as applied under the act of 1867. Therefore the above cited cases do not bear out his contention.

The next case cited by counsel for appellees is that of *In re Pease*, 129 Fed., 446, which is one of the early decisions under the present bankruptcy act—having been decided in October, 1902. The facts in this case disclose that the agent of the lender also represented the creditors who were to get the money, and that the whole scheme was to defraud the creditors of Pease. No such facts as existed in that case are even alleged much less

proven in this case. Some parts of this decision are more in support of appellants' contention than they are against same. For instance, that court says:

> "While the *consequence* to Pease's creditors of this action would not defeat the mortgage, if valid, yet they tend to show that the purpose of the lender was not the relief of the mortgagor or the preservation of his business, as he was led to believe, but the contrary." * * * * (Italics ours.)

It was further held in this case as follows:

> "Littman (the creditor) had been persistent in pressing Pease for payment, and when told by Pease, about a week before the mortgage was given, that his efforts to borrow money in Ithaca had failed, assured Pease *that he would get it for him.*"

There is no allegation in the bill nor is there any proof in this case, that Dean acted as or was the agent of the banks, the creditors who got the money he loaned Jones.

The decision in the *Pease case* therefore is not applicable to the facts in this case.

The Circuit Court of Appeals for the Eighth Circuit, in the case of *Powell* v. *Gate City Bank,* 102 C. C. A., 57, holds:

> "* * * * The security given for a present loan is not avoided by the fact that it actually hinders or delays creditors by the withdrawal of the security from application to the payment of their claims, unless it was given WITH AN ACTUAL INTENT to defraud such creditors and the recipient had actual legal notice of that purpose. ACTUAL FRAUD in which the recipient of the lien or security participates is indispensable to the avoidance of a transaction of this nature. *Coder* v.

Arts, 213 U. S., 223, 241-244; *Hiscock* v. *Varick Bank of New York,* 206 U. S., 28."

"* * * * * * There is no transaction so free from dishonesty that the imagination and ingenuity of a mind which searches for them may not find facts and circumstances surrounding it to arouse suspicions it seeks to foster."

In the cases of *Lumpkin* v. *Foley,* 204 Fed., 673, and *Johnson* v. *Dismukes,* 204 Fed., 383, cited by appellees, on page 25 of their main brief, to sustain their contention that the deed of trust in question is fraudulent under Sec. 67-e of the Bankruptcy Act, the attention of this Honorable Court is called to the fact that in both of those cases the facts were similar and both were decided at the same time by the same Judge.

It was held in the one that "the bankrupt was clearly insolvent, the transfer was hastily consummated, that claimant, who was an entire stranger to the bankrupt, made no inquiry or investigation of bankrupt's assets except to take a glance look at the stock" and in the other case that "that fraud, while not to be presumed, may be proved by circumstances as well as by direct evidence and fraud may be actual arising from the facts and circumstances and apparent from the intrinsic nature and SUBJECT OF THE BARGAIN ITSELF."

The facts in those cases are not therefore similar to the facts in the instant case. A reading of the examination in chief of the deposition of Dean, appearing on pages 101 to 112 of the printed record, shows that the said Dean before he loaned the money made a thorough inquiry as to the personal standing, credit, finances and solvency of the said Jones. This was particularly necessary, as Dean had to borrow the money and could not afford to loan it to the said Jones, however urgent his need except upon good security. After such inquiry, and as a result of which he was convinced

of the bankrupt's solvency and his high standing in the community and his excellent credit, for the courts now to hold his deed fraudulent would be a great injustice.

AS TO THE CASE OF *ROBERTS* v. *JOHNSON*.

(Referred to on page 26 of Appellees' brief.)

The first opinion rendered by Judge Smith in this case appears on page 31 of the record and the second appears on page 124. It will be observed from the third paragraph in his second opinion, he says:

> "Nor does the Court find any reason for modifying the conclusions of law found in the opinion filed July 25, 1912, to which reference is now made for a more extended discussion of the principles of law governing this case."

By reference to the last two paragraphs of his opinion filed July 25, 1912, appearing on page 41 of the record, he says:

> "This decision (referring to the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Roberts* v. *Johnson*, 151 Fed., 567) controls this Court, and under the principles as adjudicated by it and the facts admitted in the case at bar, the demurrer must be overruled. The stipulation of counsel in the letters submitted contemplating this hearing as a final hearing a formal judgment will be entered overruling the demurrer and setting aside the deed of trust."

The facts in the *Roberts case*, are easily differentiated and are not similar to the facts involved in this case, and the findings of Judge Smith being influenced by an erroneous view of the law, he erred in deciding this case on the principles and facts involved in that case

In the case of *Johnson* v. *Roberts, supra*, "A bill had been filed by the trustee of the bankrupt's estate to set aside certain mortgages on the ground that they were made with intent to hinder, delay and defraud creditors. It appeared that the bankrupt owed a debt to a manufacturer who was pressing for payment. A brother of the CREDITOR, who was employed by him, referred the bankrupt to another brother who had no business connection with the creditor, but who agreed to make a loan to be secured by a mortgage of practically all the bankrupt's property. The loan slightly exceeded the amount of the debt. As soon as the transaction was consummated and the mortgage executed the Bankrupt paid the creditor out of the proceeds of the loan. The bankrupt was insolvent at the time, and eight days later filed his voluntary petition in bankruptcy. * * * * The Circuit Court set the mortgage aside and its judgment was sustained by the Circuit Court of Appeals. It was sustained on the ground that that *if the mortgagee knew or should have known that the effect of the transaction was to give a preference to the creditor then the mortgages were within the prohibition of the bankrupt act* and the Circuit Court of Appeals having so found notwithstanding the denial of the mortgagee and the circumstances supporting this finding the Court of Appeals should affirm the judgment."

We respectfully submit that the principle of law laid down in the above case is unsound and has long since been overruled by the Circuit Court of Appeals that decided same, and by the decisions of this Honorable Court in the following cases:

In *Coder* v. *Arts*, 213 U. S., 223, this Court held:

"The mere fact that one creditor was preferred over another, or that the conveyance might have the

effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance."

In *Van Iderstine* v. *National Discount Co.*, 227 U. S., on page 582, this Court says:

> "It is therefore not in itself unlawful to prefer nor *fraudulent for one though insolvent to borrow in order to use the money in making a preference.*" (Italics ours.)

In fact, this same Circuit Court of Appeals that decided the *Roberts case*, has overruled the above-mentioned principle of law laid down in that case, in the case at bar, in the following language:

> "* * * * * That case (referring to the *Van Iderstine case*) really holds nothing more than had been previously decided in *Coder* v. *Arts*, 213 U. S., 223, namely, that 67e applies only to *actual fraud* as distinguished from a mere preference, *and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent.*" (Italics ours.)

Now as to the facts in that case. Here again we find that the party loaning the money is acting on behalf of the creditor who is to receive same in payment of his debt. No such facts exist in the case at bar. There is no claim that Dean was in any way acting for or on behalf of the banks who received his money. In fact, the Circuit Court of Appeals holds that he was not. Of course, where the lender acts for or on behalf of or as the agent of the creditor under the decision of this Honorable Court in the case of *Van Iderstine* v. *National Discount Co.*, 227 U. S., 575, his security will be held invalid. In the foregoing case, however, this

Honorable Court further holds that the mere knowledge of a lender that the money borrowed is to be applied to an existing debt does not make the security given invalid under Sec. 60-b as an unlawful preference or under 67-e as a fraud. The Circuit Court of Appeals in the case at bar so holds. See its opinion, paragraph 9, on page 141 of printed record.

We respectfully submit therefore that the District Court, in deciding this case, erred in following the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Robert* v. *Johnson, supra,* as the principle of law laid down in that case is unsound and in conflict with the opinion of this court in the case of *Van Iderstine* v. *Discount Co., supra.*

The District Judge having admitted that, in deciding the case at bar, he was controlled by the decision of the Circuit Court of Appeals of the Fourth Circuit in the above-mentioned case of *Roberts* v. *Johnson, supra,* and it now appearing that that decision is unsound and in conflict with the decisions of this Honorable Court, he was thereby influenced by an erroneous view of the law, and therefore, the decrees of the lower courts in this case should be reversed.

AS TO THE CONCLUSIONS OF FACT AND LAW FOUND BY THE DISTRICT COURT.

From a reading of the District Judge's CONCLUSIONS OF FACT and his CONCLUSIONS OF LAW, it will be observed that he does not find as a fact or as a conclusion of law that R. Crawley Jones gave the deed of trust in question with the *intent and purpose* on his part to hinder, delay or defraud his creditors or any of them, but that it was done "to do away with the possibility of criminal proceedings against himself (Jones) by getting possession of certain notes, the endorsements

on which it was rumored were forged, and for the purpose of retiring these obligations so as to get them out of the hands of the holders." (Record, page 127); nor did said Court find as a fact or as a conclusion of law, that there had been any *actual fraud* on the part of either Jones or Dean. (See findings of fact and conclusions of law on pages 124 to 129 of printed record.)

That it is essential to show *actual fraud* in order to invalidate conveyances under Sec. 67-e, is the rule laid down by this Honorable Court in *Coder* v. *Arts*, 213 U. S., 223, 244, and is the view of the textwriters upon this subject. Loveland on Bankruptcy (3rd Ed.), 476; Collier on Bankruptcy (6th Ed.), 562; 1 Remington on Bankruptcy, Sec. 1498.

This Court, in *Coder* v. *Arts, supra* (page 244), said:

> "In dealing with this question this court said, in *Thompson* v. *Fairbanks*, 196 U. S., 516:
>
> "There is no finding that in parting with the possession of the property the mortgagor had any purpose of hindering, delaying or defrauding his creditors or any of them. *Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property under the provisions of section 67-e, of the bankruptcy law.*"

The Court then says:

> "* * * * What we hold is that to constitute a conveyance voidable under Sec. 67-e, *actual fraud must be shown.*" (Italics ours.)

There being no finding of fact that Jones gave the deed of trust with the actual intent and purpose on his part to hinder, delay or defraud his creditors or any of them, or that there has been any *actual fraud* committed on the part of either Jones or Dean, it would seem to be

the duty of this Honorable Court, under the foregoing authorities, to reverse the decree of the said Circuit Court of Appeals affirming the erroneous decree entered herein by the said District Court.

The District Court found as conclusion of law as follows:

> "Third: That the deed of trust or mortgage in this case was made in contemplation of the provisions of the Bankrupt Act, and with intention to defeat the same, *as the affect thereof was to give a preference to the holder of the mortgage in contravention of the prohibition of the Bankrupt Act.*" (Record, p. 128.) (Italics ours.)

We respectfully submit that this conclusion of law, under the authorities of this Court, is erroneous and unsound.

This court in *Coder* v. *Arts, supra,* on page 242, in passing upon this point, said:

> "* * * * * The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, *was not sufficient to avoid a conveyance;* * * * * * *

This Court, in the same case, takes the following quotation from the case of *Lansing Boiler & Engine Works* v. *Ryerson,* 128 Fed., 701, in which the Circuit Court of Appeals said:

> "* * * * * For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or a present consideration, is not forbidden by such statutes, notwithstanding that the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."
> "And to the same effect is the decision of the

Circuit Court of Appeals of the Second Circuit in *In re Bloch,* 142 Fed., 674, 676."

This Court, in the case of *Van Iderstine* v. *National Discount Company,* 227 U. S., on page 582, says:

> * * * * * "It is therefore not in itself unlawful to prefer nor *fraudulent for one, though insolvent, to borrow in order to use the money in making a preference.*" (Italics ours.)

The Circuit Court of Appeals for the Fourth Circuit, from which Court this case comes, in this very case in the tenth paragraph of its opinion, which appears on page 142 of the printed record, in commenting on the case of *Van Iderstine* v. *National Discount Co., supra,* concedes this to be the law, in the following language:

> "* * * * * That case really holds nothing more than had been previously decided in *Coder* v. *Arts,* 213 U. S., 223, namely, that section 67e applies only to *actual fraud* as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudlent."

However, this well-established principle and rule of law as laid down by this Honorable Court should have been decisive of this case and while recognized by the Circuit Court of Appeals for the Fourth Circuit it refuses to follow, because as it says, "here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower (it will be noticed the Court does not say as the agent of the creditor who is to get the money) and for his benefit in carrying out the plan of preference." However, if it is not in itself unlawful to prefer nor fraudulent for one *though insolvent* to borrow in

order to use the money in making a preference, how can it be said that such a transaction is made fraudulent just because the borrower acts through an agent in making the preference, when, if he had acted for himself directly, it would not have been fraudulent? As to Dean acting as the agent of Jones in the transaction in question, the Court's attention is called to the fact that there is no allegation in the bill, nor is there any proof in the record in this case that Dean acted as or was the agent of Jones, or that he participated as such for Jones' benefit in carrying out the alleged plan of preference. This point is fully discussed in Appellant's main brief on page 33, 34 and 35.

From the foregoing it would clearly seem that the third conclusion of law reached by the District Court, that the deed of trust in question is fraudulent under Sec. 67e of the bankruptcy act, because the effect thereof was to give a preference, and the decision of the Circuit Court of Appeals affirming the same because Dean it is alleged acted as the agent of Jones in carrying out the plan of preference, are both erroneous, unsound in law and in direct conflict with the decisions of this Court as above indicated, and therefore they should be reversed.

Respectfully submitted,

WYNDHAM R. MEREDITH,
C. V. MEREDITH,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 364.

CLAUDE M. DEAN, APPELLANT,

versus

R. BEALE DAVIS, JR., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF R. CRAWLEY JONES, BANKRUPT, AND W. P. WELLS, SUBSTITUTED TRUSTEE, APPELLEES.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF BARTLETT ROPER, COUNSEL FOR R. BEALE DAVIS, JR., TRUSTEE, APPELLEE.

This is the same cause in which this court, on November 16, 1914, denied to said appellant a writ of certiorari (Record p. 171). On the 27th day of November, 1914,

after the denial of the said writ of certiorari and after the mandate of the Circuit Court of Appeals, Fourth Circuit, had issued to the District Court of the United States for the Eastern District of Virginia, to-wit, on November 24, 1914, and after appellee's deposit for costs had been returned by the clerk of Circuit Court of Appeals (Record p. 171), Bartlett Roper, as attorney for said R. Beale Davis, Jr., trustee, appellee, presented to said District Court, at Richmond, Virginia, a draft of a decree, to be entered in the matter of R. Crawley Jones, bankrupt, pending in said court, directing the transfer by Joseph P. Brady, clerk of said court, of the sum of $1,634.00, then on deposit in the National State and City Bank, Richmond, Virginia, to the Planters National Bank, of said city, the designated depository of said court for bankruptcy funds. As directed by a former decree entered in said matter of R. Crawley Jones, bankrupt, the said sum of $1,634.00 had been deposited in said National State and City Bank to await the decision of the United States courts as to the validity of a certain deed of trust executed by said R. Crawley Jones, bankrupt, securing to said appellant the payment of the sum of $1,600 and interest, evidenced by four certain notes executed by said bankrupt. (This suit having been instituted by said R. Beale Davis, Jr., trustee, appellee, to test the validity of said deed of trust.)

The said appellant objected to the entry by said court of said decree directing the transfer of said sum of $1,634.00 unless there was inserted therein a clause filing and allowing his claim for $1,600.00 and interest as an unsecured claim against the estate of the said R. Crawley Jones, bankrupt, insisting that he had the right not only to file his claim but also to have the court by said decree allow same as an unsecured claim against the estate of said bankrupt and thereby save him the trouble and expense

of having to appear before the referee in bankruptcy at Petersburg, Virginia.

On December 4, 1914, the said appellant and said Bartlett Roper, attorney for said R. Beale Davis, Jr., trustee, appellee, together appeared before the Hon. Edmund Waddill, Jr., judge of said District Court, at Richmond, Virginia, and, after due consideration of the matter, it was then and there distinctly understood and agreed by and between the said Claude M. Dean, appellant, and the said Bartlett Roper, attorney for said trustee, that, if James M. Quick, Jr., attorney at law, of Petersburg, Virginia, who represented one, R. E. Blakey, a large creditor of said bankrupt, had no objection, a clause such as wished by the said appellant would be inserted in the draft of said decree and the decree entered accordingly. At the request of the court, the said Bartlett Roper, attorney, on his return to the city of Petersburg, Virginia, saw the said James M. Quick, Jr., attorney, and promptly notified the court that the said Quick had no objection to the insertion in said draft of decree of a clause such as wished by the said appellant, and said decree, with said clause inserted therein, was accordingly entered by said court as of November 27, 1914. As directed by said decree, the said sum of $1,634.00 was duly withdrawn by said clerk from said National State and City Bank and placed on deposit in the said Planters National Bank, the designated depository of said court for bankruptcy funds, to the credit of said court in said matter of R. Crawley Jones, bankrupt. A certified copy of said decree, marked "A," appears on page 9 of appellee's brief in support of his motion to dismiss the appeal allowed herein.

On the 19th day of December, 1914, another decree was, with the full knowledge and consent of the said appellant, entered by said District Court in said matter of R. Crawley Jones, bankrupt, making certain allowances, out of

said fund of $1,634.00, to the said Bartlett Roper, as attorney for certain petitioning creditors as well as counsel for the said R. Beale Davis, Jr., trustee, appellee, and directing that B. C. Syme, Esq., referee in bankruptcy, at Petersburg, Virginia, formulate and report to court a scheme of distribution of the fund remaining in said Planters National Bank to the credit of the court in said bankruptcy matter. On December 22, 1914, the said Bartlett Roper, attorney, was paid out of said fund of $1,634.00, the amount of the allowances made him by said decree. A certified copy of said decree, marked "B," appears on pages 11 and 12 of appellee's brief in support of his motion to dismiss the appeal allowed herein. The said referee, as directed by said last mentioned decree, after giving the necessary notice, prepared his report, and on the 20th day of January, 1915, the same was duly filed in the clerk's office of said District Court. In said report the said claim of the said appellant is duly reported as an unsecured claim against the estate of said bankrupt.

Several weeks after the above mentioned two decrees had been entered in said matter of R. Crawley Jones, bankrupt, the said appellant made application to this court for an appeal from the decree of the United States Circuit Court of Appeals, Fourth Circuit, entered on February 14, 1914, affirming the decree of the said District Court, invalidating and declaring null and void the said deed of trust executed by said bankrupt, securing to the said appellant the payment of certain notes aggregating the sum of $1,600.00 and interest, and on the 27th day of January, 1915, the said appellant was allowed an appeal by the Hon. Edmund D. White, chief justice of the United States (Record p. 190).

On January 29, 1915, the said Bartlett Roper, attorney, received from the said Claude M. Dean, appellant, the following letter:

"Richmond, Va., Jan. 28, 1915.

Bartlett Roper, Jr., Esq.,
Petersburg, Virginia.
Dean v. Davis, Trustee, etc.

Dear Sir:

I beg to advise you that Chief Justice White has granted me an appeal to the Supreme Court of the United States in the above case and said appeal is to operate as a supersedeas. Please advise me if you will accept service of citation, which as you well know is the usual practice.

Yours very truly,
CLAUDE M. DEAN."

On January 30, 1915, the said Bartlett Roper, attorney, wrote and forwarded to the said Claude M. Dean, appellant, at Richmond, Virginia, the following letter, in reply to the letter received by him:

"ROPER & DAVIS,
Attorneys at Law,
Petersburg, Va.

January 30, 1915.

Mr. Claude M. Dean,
Richmond, Virginia.

Dear Sir:

I have your letter of January 28th advising me that Mr. Chief Justice White had granted you an appeal to the Supreme Court in the case of Davis, trustee, against Dean and you desire me to accept service of the citation.

In reply I would say that I am a little surprised to know that application had been made in this case for an appeal and the same had been granted in view of the fact that on December 4, 1914, over two weeks

after your petition for a writ of certiorari had been denied by the Supreme Court and about ten days after the mandate of the Court of Appeals had issued, you voluntarily appeared with me before the Hon. Edmund Waddill, Jr., judge of the District Court of the United States for the Eastern District of Virginia, and upon your motion a clause was inserted in the decree, directing the fund to be turned over to the bankruptcy court, filing and allowing your claim as an unsecured claim against the estate of said bankrupt. As you will remember, you insisted that you were entitled under our said agreement of September 18, 1909, not only to file an unsecured claim but to have the claim allowed by the court. I offered no objection, but since James M. Quick, Jr., who was not present, and who represented the claim of R. E. Blakey, might have some objection to the filing and allowance of your claim, Judge Waddill fixed a date when he would hear your motion and requested me to notify Mr. Quick to be present if he had any objection to offer. On my return to Petersburg I saw Mr. Quick and notified Judge Waddill that he had no objection to make, so the order with the clause wished by you inserted therein was with your consent as well as mine entered by the judge. A few days thereafter an order was entered in said cause in bankruptcy directing that B. C. Syme, referee in bankruptcy, formulate and report to court a scheme of distribution of the fund, and I understand he has given the required notice and completed his report. This order of reference, as your letter of January 6, 1915, plainly shows, was entered with your knowledge and consent. Further you knew that application had been made by me to Judge Waddill for certain allowances out of the fund as attorney for the petitioning cred-

itors as well as attorney for the trustee in bankruptcy and that said allowances would be made, for I notified you that I would ask for certain allowances out of the fund. You were in his office with me when he asked me about the amount of allowance I wished made and heard me tell him that I would leave the matter entirely with him. What is more the clerk of the U. S. Circuit Court of Appeals on November 24, 1914, returned to me the appellee's deposit of $20, also the taxed attorney's fee. This letter appears to have been dictated by you.

In view of the above facts and particularly in view of our written agreement of September 18, 1909, which appears on pages 14 and 15 of the record, whereby it was agreed between us that the fund 'May be paid over on mutual agreement of the said Claude M. Dean and Bartlett Roper, Jr., attorney as aforesaid,' the decree entered by Judge Waddill, with our consent, directing that the fund be turned over to the bankrupt court for distribution, constituting such a 'mutual agreement,' I would prefer that the citation be served as required by law, for I do not know what effect under the circumstances the acceptance of legal service by me might have on the future proceedings that may arise in this matter.

Yours very truly,
BARTLETT ROPER, JR."

The said attorney has never received a reply to this letter.

On the same day the said Bartlett Roper, attorney, wrote and forwarded to the Hon. Edmund Waddill, Jr., judge of the said District Court, the following letter and enclosed therein a copy of his said letter to the said Claude M. Dean, appellant herein:

"ROPER & DAVIS,
Attorneys at Law,
Petersburg, Va.

January 30, 1915.

Judge Edmund Waddill, Jr.,
Richmond, Va.

My dear Judge:

About the first part of December of last year you entered a decree in the matter of R. Crawley Jones, bankrupt, transferring a certain fund at that time in the National State and City Bank to the Planters National Bank, the regular depository of your court for bankruptcy funds. As you no doubt remember, this decree was held up so to speak by Mr. Claude M. Dean because the same did not contain a provision filing and allowing his claim as an unsecured claim against the said bankrupt's estate. At your request Mr. Dean and I met you by appointment at your office on December 4, 1914, and after discussing the matter, it was distinctly understood and agreed between us that, if Mr. James M. Quick, Jr., who represented the creditor, R. E. Blakey, had no objection, a clause, such as wished by Mr. Dean, would be inserted in the decree and the decree entered by you. At your request, I saw Mr. Quick on my return to Petersburg and notified you that he would make no objection to a clause being inserted in the decree such as wished by Mr. Dean, so the decree was entered after the clause had been inserted. A few days thereafter a decree was entered by you in said matter, with the full knowledge and consent of Mr. Dean, making me certain allowances out of the fund and referring the matter to B. C. Syme, Esqr., referee in bankruptcy with directions to formulate and report to court a scheme of distribution of the

found to the credit of the court in said cause. The referee, acting under said order of reference, gave the required notice and has completed and filed his report.

On yesterday I received a letter from Claude M. Dean advising me that Mr. Chief Justice White had granted him an appeal to the Supreme Court in the case of Davis, trustee, against Dean. After Mr. Dean's petition to the Supreme Court for a writ of certiorari in this case was denied by the court on November 16, 1914, and the mandate of the Court of Appeals had issued, he consented, as you well know, to the entry by you of the decree transferring the fund on deposit in the National State and City Bank, which had been deposited there to await the decision in the case of Davis, trustee, against Dean, to the Planters National Bank, the designated depository of bankruptcy funds, also to the entry of the decree referring the matter to the referee.

I must say I am at a loss to understand Mr. Dean's action in making application to the Supreme Court for an appeal after consenting as he did to the entry by you of the above two decrees in the matter of R. Crawley Jones, bankrupt, and in justice to myself, while the matter is fresh in your memory, I feel that I should bring the same to your attention.

As you wrote me in your letter of December 18, Mr. Dean talked with you regarding the amount of the allowances to be made me out of the fund, insisting that the same should be reduced by one or more taxed attorney's fees paid by him and called your attention to the fact that the fund had lost interest during the past two years.

Since the date the notices were sent out by the referee I have received numerous letters from creditors requesting that I advise them about when they

will receive their dividend in this matter and I am at a loss to know what to write them.

I am herewith enclosing copy of letter received from Mr. Dean, also copy of my reply.

With kindest regards, I am,

Yours very truly,

BARTLETT ROPER, JR."

On or about February 1, 1915, the said Bartlett Roper, attorney, received from the Hon. Edmund Waddill, Jr., judge of said court, the following letter in reply to his said letter of January 30th:

"OFFICE UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA, RICHMOND.

February 1st, 1915.

Bartlett Roper, Jr., Esq.,
Attorney at Law,
Petersburg, Va.

Dear Bartlett:

I have your letter of [illegible] 30th, enclosing me correspondence bet[illegible] and Mr. Dean, in the Jones case in [illegible] been granted an appeal by the Supr[illegible]ourt.

I can only say [illegible]at the matter comes as a surprise to me, as it certainly does to you, and *all that you say in Mr. Dean's letter and to me regarding the action taken since the mandate of the Circuit Court of Appeals was certified down after the refusal of the certiorari, is correct.* (Italics ours.)

If the bankrupt law is ever made the subject of criticism because of delays that arise therein, it occurs to me this case will afford a fine object lesson.

With kind regards,

Yours very truly,

EDMUND WADDILL, JR.,
United States Judge."

(The original of this letter is filed with the court and use of the same is here made with the consent of the said Hon. Edmund Waddill, Jr.)

The court will note that the facts hereinbefore set out are fully substantiated by the said letter of the Hon. Edmund Waddill, Jr.

It is, therefore, respectfully submitted that the said appellant, having voluntarily, and in a court of competent jurisdiction, admitted the invalidity of the lien claimed by him, after the invalidity thereof had been established by the said decree of the United States Circuit Court of Appeals for the Fourth Circuit, and after a writ of certiorari had been denied him by this honorable court, and having consented to the distribution of the fund on which he theretofore claimed a lien, and filed his claim as an unsecured claim, should not now, in this appeal, be allowed to take a position and make a contention directly opposed to his own actions and admissions, and that he is, and should be, estopped to question the correctness of the said decree appealed from.

Should the court, however, be of the opinion that the said appellant is not estopped to question the correctness of the said decree of the United States Circuit Court of Appeals appealed from, then a discussion of the law and of the facts of this case becomes pertinent.

Time will not permit us to take up and consider separately the appellant's numerous assignments of error, twenty-two in number, which appear on pages 173-187 of the record, so we must to a large extent confine ourselves to a discussion of the law and of the facts as appears from the record, but we will hereafter comment on such of the appellant's assignments of error as we think require any comment from us.

Brief History and Material Facts of Case.

On the 25th day of April, 1910, R. Crawley Jones was adjudged an involuntary bankrupt by the District Court of the United States for the Eastern District of Virginia on the petition of certain creditors filed in said court on December 24, 1909 (Record p. 47). An appeal was allowed said bankrupt, and on the 21st day of December, 1910, the Circuit Court of Appeals, Fourth Circuit, affirmed the action of the said District Court in its said order of adjudication (Record p. 56). At the first meeting of the creditors of said bankrupt, the appellee was duly elected trustee of the estate of said bankrupt and the same day duly qualified as such (Record p. 82). On the 5th day of March, 1912, the appellee filed a suit in said District Court against the said appellant and one W. P. Wells, trustee, for the purpose of testing the validity of a certain deed of trust, dated September 3, 1909, executed by said bankrupt and his wife to one E. C. Dean, trustee, who was the father of said petitioner, securing to said appellant the payment of four certain notes made by said bankrupt aggregating the sum of $1,600 and interest (Record p. 2, *et seq*). On the 4th day of May, 1912, the said appellant filed a demurrer to appellee's bill (Record pp. 29 and 30), and, after due hearing, the court, on the 25th day of July, 1912, filed its decree overruling said demurrer, invalidating said deed of trust and declaring the same null and void under the provisions of the bankruptcy act—the court having understood from the stipulations of counsel and statements made by counsel at the bar of the court that the decision on the demurrer should be a final determination of the matters at issue (Record pp. 31, 46). Later, to-wit, on September 28, 1912, on claim being made by the said appellant and his counsel that the court had misunderstood the scope and intent of said stipulations, and they had been taken by surprise, the court filed another decree modifying its former

decree of July 25, 1912, so as to limit it only to a decree overruling said demurrer, and in said decree directed that said appellant answer the bill of complaint on or before the second Monday in October, 1912, or, in default thereof, that the bill be taken *pro confesso* (Record pp. 42-47). On the 14th day of October, 1912, the said appellant filed his answer to said bill (Record p. 47), to which said answer the appellee filed a general replication (Record p. 134) and testimony in support of the allegations of said bill and answer was duly taken (Record pp. 58-123).

On the 15th day of February, 1913, this cause was heard on the pleadings and testimony, and on the 14th day of April, 1913, the learned judge of said court, Hon. Henry A. M. Smith, United States district judge for South Carolina, designated to sit in the Eastern District of Virginia, found the following conclusions of fact and law:

CONCLUSIONS OF FACT.

"1. On September 1st, 1909, R. Crawley Jones, the bankrupt, was insolvent, and being insolvent wrote the following letter to the defendant Claude M. Dean, who was his brother-in-law, the said R. Crawley Jones having married the sister of the said Claude M. Dean:

Darvills, Va., Sept. 1st, 1909.

Dear Claude:

I am in serious trouble and need your help at once badly, being charged with a very grave offense under the law, and if arrested for same, although I afterwards prove myself innocent, it would be a disgrace to me and my family. If I can get hold of $1,600.00 in cash I will be saved, so for God's sake loan it to me and save my wife and child from disgrace. If you will do this I will give you notes for the amount and a deed of trust on everything

I have or possess to secure you. All I need is a little time, for I have enough to more than pay you five times over again. It is absolutely necessary that I have this money at once. As soon as I quiet this matter up I will see you and explain all. Please do this for me and my family at once, for I have no time to lose or explain further. Find notes inclosed for the amount and as soon as you prepare deed of trust I will sign same.

Sincerely yours,

R. C. JONES.

"2. That at the date of writing the said letter or prior thereto the said R. Crawley Jones was threatened with or under apprehension of criminal prosecution concerning certain endorsements on notes made by the said R. Crawley Jones and purporting to bear the endorsements of certain persons, which endorsements were claimed or alleged to be not genuine. Some of these notes were at that date held by the Virginia National Bank of the city of Petersburg, some of them being not yet due.

3. This letter was delivered to Claude M. Dean by J. Samuel Jones, the father of R. Crawley Jones, on the 2nd of September, 1909, and the said J. Samuel Jones at the time of the delivery of the letter to Claude M. Dean gave him further information as to the threatened or impending criminal prosecution against R. Crawley Jones for charges connected with the endorsements upon these notes, and at the same time gave him information as to the financial condition of R. Crawley Jones. Thereupon Claude M. Dean informed J. Samuel Jones that he would make arrangements to raise the money the next day if the bank would agree to payment then, which information was to be ascertained

by Mr. J. Samuel Jones and telegraphed to Claude M. Dean that day, which was done.

"4. On the 3rd of September, 1909, Claude M. Dean raised the money and met J. Samuel Jones in Petersburg. Thereupon the two first went to a bank in Petersburg, where certain notes of the same character were paid by money advanced by J. Samuel Jones, and then they went together to the Virginia National Bank of Petersburg, where to the $1,600.00 furnished by Mr. Dean there was added enough by Mr. J. Samuel Jones to take up the notes with the questionable endorsements held by the Virginia National Bank. The notes taken up at the Virginia National Bank were not marked paid, but were delivered to Claude M. Dean when the money was paid and by him some time afterwards handed over to R. Crawley Jones.

"5. On the 3rd of September, 1909, Mr. Claude M. Dean, before the notes were taken up, had certain conversations with the cashier of the Virginia National Bank of Petersburg. What was the tenor of these conversations is a matter of contradiction in the testimony between Mr. Dean and the cashier, Mr. Long, but as the determination of the correctness of the conversations stated by either is not in the court's opinion necessary for the decision of this case no conclusion of fact dependent upon the conflicting testimony of the two is found thereon.

"6. After the retirement of the notes Mr. Dean prepared a deed of trust by way of mortgage to be signed by R. Crawley Jones to secure the notes stated in his letter dated September 1st, 1909, amounting to $1,600.00. These notes were four in number, all dated the 1st day of September, 1909, payable, respectively, at seven, thirty, sixty and ninety days after date. On the non-payment of any

note at maturity all the others became at once due and payable. The first note was for $100.00, and matured on the 10th September, 1909. The other notes were for $500.00 each. On the 10th of September, 1909, the deed of trust prepared by Mr. Claude M. Dean to be signed by R. Crawley Jones was executed by R. Crawley Jones and his wife. It was dated the 3rd of September, 1909. This deed of trust covered the entire property of R. Crawley Jones—viz., it covered all his household goods and furniture, all his kitchen furniture, all his live stock, all his crops growing and cut, all his stock of goods and merchandise, all his store fixtures and furniture, all his accounts and bills receivable, and all his landed property. The trustee named in the deed of trust was Mr. E. C. Dean, the father of Mr. Claude M. Dean.

"7. On the 11th September, 1909, Claude M. Dean, the first note not having been paid, directed the trustee under the deed of trust by way of mortgage to take possession of the property covered by the mortgage and proceed to execute the same, and the trustee thereupon took possession on the 13th September, 1909.

"8. Thereafter by agreement the defendant, William P. Wells was substituted as trustee under the deed of trust in lieu of Mr. E. C. Dean, upon agreement that he should hold the proceeds of sale of the mortgaged property subject to the determination of the court as to the validity of the deed of trust.

"9. On the 24th December, 1909, a petition for involuntary bankruptcy was filed against R. Crawley Jones, which was resisted by him, but on which he was subsequently on the 25th April, 1910, adjudicated bankrupt, and it appeared that he was in-

solvent both on the 1st of September, 1909, and thereafter.

"10. The substituted trustee, William P. Wells, disposed of the property covered by the deed of trust, which realized the sum of $1,634.00, which is held to meet the result of this litigation and practically represents the entire bankrupt estate.

"11. That the bankrupt, R. Crawley Jones, on the 1st of September, 1909, knew that he was insolvent, and knew that the Virginia National Bank of Petersburg held notes of his upon which he was liable to criminal prosecution by reason of charges concerning the endorsements thereon, and was entirely convinced of the necessity of the retirement of these obligations so as to get them out of the hands of the holders and do away with the possibility of criminal proceedings against himself based upon them.

"12. That Claude M. Dean before furnishing the $1,600.00 made no investigation of the affairs of R. Crawley Jones beyond the conversation had by him with J. Samuel Jones, the father of R. Crawley Jones, and the conversations had by him with John W. Long, the cashier of the Virginia National Bank of Petersburg, the tenor of which is the subject of the conflict of testimony between Mr. Long and Mr. Dean.

"13. That Claude M. Dean desired to assist R. Crawley Jones, the bankrupt, who was his brother-in-law, and to rescue him from the disgraceful exposure which threatened him, and for that purpose consented to furnish the money which was sought of him to be advanced.

"14. That Claude M. Dean, under the circumstances at the time of the appeal to him to advance the money, had reasonable cause to believe that R.

Crawley Jones was then insolvent and that by reasonable examination of the affairs of R. Crawley Jones, if such examination had been made at the time, he would have been able to ascertain that R. Crawley Jones was in fact then insolvent.

"15. That Claude M. Dean knew that the effect of giving the mortgage to him and the use of the money lent by him to pay the notes held by the bank would be to retire those notes in full, which were obligations held by existing creditors, leaving to all other creditors only what might remain out of the proceeds of all the property of R. Crawley Jones after the payment in full under the mortgage of the amount loaned by Claude M. Dean to retire those existing notes upon which were the questionable endorsements.

"16. That some of the stock of goods and merchandise mortgaged to Claude M. Dean, the sale of which constitutes a portion of the proceeds of the mortgaged property, consisted of goods furnished by unsecured creditors, which goods had not been paid for and which creditors are now among the unsecured creditors of the bankrupt.

"17. That Claude M. Dean knew that the money loaned by him would be applied to the payment of existing debts, not in the ordinary course of business, but for the purpose of enabling R. Crawley Jones to avoid an apprehended criminal prosecution" (Record pp. 124-128).

CONCLUSIONS OF LAW.

"*First:* That Claude M. Dean must be presumed to have been aware under the facts in this case that the result of the application of the loans made by him to the retirement of those notes would be to

substitute for existing unsecured debts the debt then incurred to him, giving it a priority for the purpose of accomplishing a particular result, to-wit, the retirement of existing unsecured debts upon which his brother-in-law was liable to criminal prosecution and the substituting therefor of another debt to him for the payment of which all his brother-in-law's property was mortgaged.

"*Second:* That when he accepted this mortgage Claude M. Dean under the facts must be presumed to have known that it was made in contemplation of the provisions of the bankrupt act in that it was intended to operate, and actually operated, to accomplish something which was forbidden by that statute, to-wit, the substitution of a secured debt for and in the place of an unsecured debt which it was desired to pay in full so as to avoid criminal prosecution.

"*Third:* That the deed of trust or mortgage in this case was made in contemplation of the provisions of the bankrupt act, and with intention to defeat the same, as the effect thereof was to give a preference to the holder of the mortgage in contravention of the prohibition of the bankrupt act" (Record p. 128).

In addition to the foregoing conclusions of fact found by the court, the testimony in the record shows that on September 3, 1909, the date the notes held by the Virginia National Bank were taken up and turned over to the petitioner unstamped, some of said notes were not due (Record p. 66); that prior to the date the said appellant and J. Samuel Jones went to the banks in the city of Petersburg, Virginia, and took up said notes the said appellant knew that the bankrupt's stock of goods had not been fully paid for (Record p. 105); that while the said appellant

stated in his evidence that he had no knowledge of the prior deed of trust to J. M. Quicke, Jr., trustee, executed by said bankrupt on his farm, until the 10th day of September, 1909, the said deed of trust to E. C. Dean, trustee, which he states was prepared by him on September 3, 1909, on his return to the city of Richmond, refers in terms to this prior deed of trust (Record pp. 12 and 50); that while the said deed of trust is dated September 3, 1909, the date the notes were taken up at the banks in Petersburg, and on its face purports to have been signed and acknowledged by said bankrupt and his wife on that date, it is admitted by the appellant (R. p. 108), and testified to by the notary who signed the certificate of acknowledgment, that the said deed of trust was neither signed nor acknowledged by the parties thereto until the 10th day of September, 1909, a week thereafter—the notary further stating that he carelessly signed the said certificate without reading it over, relying on the appellant, who was doing the writing, that the same was filled in correctly, the appellant telling him that he had just to sign his name (R. pp. 72 and 73); that J. Samuel Jones, the father of said bankrupt, who went with said appellant to the Virginia National Bank at the times the notes were taken up, was one of the endorsers on the said notes of said bankrupt held by said bank, and was anxious that said notes be taken up not only to prevent criminal proceedings against his son, but also to relieve himself of any financial embarrassment growing out of his endorsements on said notes (R. p. 66); that the said bankrupt listed in his bankruptcy schedules property of very little, if any, value (Exhibit X); that at the first meeting of the creditors of said bankrupt unsecured claims amounting to $5,394.08 were filed and allowed by the referee (R., p. 83), and that the creditors filing said claims were principally merchants who had sold the said bankrupt merchandise for the conduct of the retail merchandise business conducted by him (R. p. 80), and that a great many of the

goods of said merchants, which had not been paid for, were in said storehouse and were included in said deed of trust (R. p. 80); and that prior to the execution of the said deed of trust of September 3rd the said bankrupt had in his possession, made out in his own handwriting, a complete list of his unsecured creditors, from which said list it appears that his creditors numbered forty-nine, with an aggregate indebtedness of $7,665.86, which amount did not include the sum of $1,600.00 and interest claimed to be secured by the said deed of trust in controversy (R. pp. 81 and 82).

The learned judge of the District Court, on the above conclusions of law and fact found by him, adjudged, ordered and decreed that the said deed of trust of September 3rd, 1909, was invalid under the provisions of the bankruptcy act, and set aside, vacated and declared the same null and void.

On the 10th day of May, 1913, the said appellant filed a petition for an appeal, also an assignment of errors, and on the same day was allowed an appeal to the Circuit Court of Appeals, Fourth Circuit. (R. pp. 129, 134.) The said Circuit Court of Appeals at its November term, 1913, heard said appeal, and at its February term, 1914, rendered its decision, affirming the decree of the District Court appealed from—the said court being of the opinion that the said deed of trust of September 3rd, 1909, executed by said bankrupt and his wife, was invalid not only as in fraud of creditors, under section 67-e of the bankruptcy act, but also as a preference under section 69-b of said act. (R. pp. 138-143.)

On the 16th day of April, 1914, the said appellant filed a petition for a rehearing, which said petition, after due consideration by the court, was, on the 13th day of June, 1914, denied, and on the same day the mandate of the court was stayed pending an application by the said petitioner in this honorable court for a writ of *certiorari*. (R. pp. 147, 169 and 170.)

The said appellant then filed in this court a petition for a writ of *certiorari*, and, on the 16th day of November, 1914, the same was denied. (R. p. 171.) On the 27th day of January, 1915, the said appellant filed his petition praying for an appeal, and on the same day was allowed an appeal to this court by the Hon. Edward D. White, Chief Justice of the United States. (R. pp. 171 and 190.)

ARGUMENT.

We will now consider briefly the law bearing on the facts as disclosed by the record, and see what has been the ruling of the courts in cases involving a similar state of facts.

Under the act of 1867 all transfers OUT OF THE DUE COURSE OF TRADE were PRIMA FACIE EVIDENCE OF FRAUD and the same rule applies under the Act of 1898;

Walburn v. *Babbitt*, 16 Wall., 577;
In re Knopf (D. C. S. Car.), 17 Am. B. R., 48, 146 Fed. Rep., 109;
Dokken v. *Page* (C. C. A., 8 Cir.), 17 Am. B. R., 228, 47 Fed., 438.

In the case of *In Re Knopf, supra*, Judge Brawley, citing with approval the case of *Walburn* v. *Babbitt*, held that a transfer by a retail merchant of his entire stock of goods is not a sale in the usual course of trade, but is PRIMA FACIE FRAUDULENT and imposes upon the purchaser the active duty of inquiring into the vendor's financial situation.

In the case of *Walburn* v. *Babbitt* (*supra*) Mr. Justice Davis says "where a retail merchant in a small country town sells his entire stock to one person, it is *prima facie* fraudulent sale under the bankrupt act although full value be paid. *The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome*

by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller." (Italics ours.)

In the case of *Dokken* v. *Page* (C. C. A., 8th Cir.), 17 Am. B. R., 228, 147 Fed., 438, before Van Devanter, Adams and Phillips, Judge Phillips, referring to the case of *Walburn* v. *Babbitt*, says: "The pronouncement of the Supreme Court in *Walburn* v. *Babbitt*, 16 Wall., 577, as applied to the facts of the case at bar, has ever since been the recognized rule of law and has been repeatedly followed on the circuits under the present Bankruptcy Act." Quoting from *Walburn* v. *Babbitt*, Judge Phillips says: "But it is a wholly different thing when he sells his entire stock to one or more persons. This is *an unusual occurrence*, out of the ordinary mode of transacting such business, is *prima facie* evidence of fraud and throws the burden of proof on the purchaser to sustain the validity of his purchase." (Italics ours.)

The proofs in the case at bar show that the said deed of trust executed by said bankrupt embraced and covered all of his property of every kind and description, namely, (1) his household and kitchen furniture, each item thereof being specifically named and enumerated, (2) certain live stock consisting of two cows, 1 yearling and 9 head of hogs, (3) growing crops of corn and tobacco, tobacco already cut and corn on the premises, (4) stock of goods and merchandise in his store house at or near Darvills, in Dinwiddie county, Va., consisting of dry goods, notions, boots, shoes, hats, hardware, lard, sugar, coffee and meat, (5) fixtures in said storehouse consisting of counters, show cases, iron safe and two National Cash Registers, (6) debts due said bankrupt as well as all open accounts, and (7) equity in a certain tract of land in Dinwiddie County, Va., containing 201 acres, said land being subject to a prior deed of trust to J. M. Quicke, Jr., trustee, securing the sum of $3,000.00 and interest due R. E. Blakey (R., 11-14).

A case almost identical with the case at bar is the case of *In re Pease*, (C. C. A., 6th Cir.), 12 Am. B. R., 66; 129 Fed., 446.

Judge Swan, in his opinion delivered in the above case, says:

> "One actually insolvent has no equitable interest in what is only nominally his property. The effect of his transfer is to hinder, delay, and defraud his other creditors without the hope or possibility of benefiting himself. The reasons for sustaining a sale or security given by one commercially insolvent in the effort to save his business and avoid bankruptcy have no application to one who has lost everything, and who by a sale or mortgage of his property necessarily withdraws it, in whole or in part, from the reach of creditors. Both lender and borrower are chargeable with knowledge of the obvious effect of the transactions upon unsecured creditors, and with colluding to defeat the Bankrupt Act, if the insolvent seasonably becomes a bankrupt. Had the Security Trust Company in this case been a pre-existing creditor of Pease its security for its debt would have been indefensible. It is equally so when it ignored the means of knowledge of the grantor's hopeless insolvency, and knowing that the money was to be used to pay unsecured pre-existing debts. A loan of that character is not sanctioned by the reasoning in either *Tiffany* v. *Boatman's Inst., supra*, or *Tiffany* v. *Lucas*, 15 Wall., 410-424, in neither of which was the vendor known to be even commercially insolvent. It seems clear from these considerations that, although a present consideration passed to Pease for the mortgage, the avowed purpose and necessary effect of the transaction, under the facts in this case, deny to the mortgagee the character of a purchaser in good faith."

The facts in the case of *Lumpkin* v. *Foley*, (C. C. A., 5th Cir.), 29 Am. B. R., 673, 204 Fed. Rep., 372 (decided April, 1913), are very similar to the facts in the case at bar.

Judge Sheppard in delivering the opinion of the court, says:

> "Although the transfer to the said Lumpkin was for a present fair consideration, the said claimant, Lumpkin, was not a purchaser in good faith and that the transfer to him was void under section 67e of the bankruptcy act; and that fraud, while not to be presumed, may be proved by circumstances as well as by direct evidence and fraud may be actual arising from the facts and circumstances and apparent from the intrinsic nature and subject of the bargain itself."

The facts in the case of *Johnson* v. *Dismukes* (C. C. A., 5th Circuit), 29 Am. B. R., 686, 204 Fed. Rep., 382, are also very similar to the facts in the case at bar.

Judge Sheppard, in delivering the opinion of the court, lays down the law as follows:

> "Where bankrupt mortgaged his entire stock of goods and used the proceeds to pay his bank and kinsmen debts due them, and it appeared that at the time bankrupt was clearly insolvent, that the transaction was hastily consummated, that claimant, who was an entire stranger to bankrupt, made no inquiry or investigation of bankrupt's assets except to take a glance look at the stock, and that reasonable inquiry would have revealed to him bankrupt's insolvency and his intention to hinder and delay, if not to defraud, his general creditors, the mortgage was void under section 67e of the Bankruptcy Act." Quoted from syllabus of case.

The decision of the Circuit Court of Appeals, Fourth Circuit, in the case of *Roberts* v. *Johnson,* 18 Am. B. R. 132, 157 Fed. 567, involving a similar state of facts, is in line with the above cited cases.

We will not comment on the numerous cases cited by appellant in his brief further than to say that in none of them were the facts at all similar to the facts in the case at bar.

Since the appellant in his brief places such strong reliance on the case of *Van Iderstine* v. *National Discount Company,* 227 U. S. 575, decided by this court February 24th, 1913, we will comment briefly on the facts in this case.

Judge Woods, who delivered the opinion of the Circuit Court of Appeals in the case at bar, in commenting on the *Van Iderstine case,* says:

> "That case really holds nothing more than had been previously decided in *Coder* v. *Arts,* 213 U. S. 223, 22 Am. B. R. 1, namely, that section 67-e applies only to actual fraud as distinguished from a mere preference, and that the fact that the lender knew at the time of making the loan and taking the security that the borrowed money would be used to prefer a creditor did not make the transaction fraudulent. But here there was not only knowledge of an intended preference, but actual participation by the lender as agent of the borrower and for his benefit in carrying out the plan of preference, which it was obvious would result in closing the business of the debtor." (See opinion R. pp. 138-143.)

In the *Van Iderstine case* the bankrupts borrowed certain sums of money on certain of their book accounts, and the record in the Circuit Court of Appeals shows that at that time the bankrupts had other property and were rated as being worth from $50,000 to $75,000 (23 Am. B. R.

345); that it was doubtful if the bankrupts intended to defraud, but if they did the National Discount Company did not know thereof and was not charged with knowledge by any of the circumstances surrounding the transaction. In the case at bar the bankrupt, who was a retail merchant conducting a general retail merchandise business at a cross-road store near Darvills, in Dinwiddie county, Virginia, made a transfer of all his property of every kind and description, including his stock of goods and fixtures, which property when sold by the trustee produced a net amount just a little in excess of the amount of the four notes held by said appellant and secured by the said deed of trust. The proofs also show that the said appellant knew or was charged with knowledge of the bankrupt's fraudulent intent and purpose in making said transfer.

There is a line of cases, following the doctrine laid down by this court in the old case of *Tiffany* v. *Lucas*, 18 Wall. 410, sustaining liens given by an insolvent debtor, in good faith, for a present consideration and for the purpose of enabling him to CONTINUE his business, but we respectfully submit that no case can be found upholding and sustaining liens given by an insolvent debtor where the evident purpose and effect of the execution of the lien would be to destroy his business, which the record plainly shows was the purpose and intent of the debtor in the case at bar, the appellant having full knowledge of said intent.

Discussion of Certain Questions Raised in Appellant's Brief.

The following language appears on page 9 of appellant's brief:

> "The bill sets out only one ground for setting aside the deed of trust of September 3, 1909. That was that it had been given by Jones with intent to

> prefer Dean over his other creditors of the same class. The prayer of the bill was that the deed for that reason might be set aside and declared void."

The appellant is clearly in error in the above statement. A reading of the bill will plainly show that facts are alleged therein and proven which show conclusively that the said deed of trust was made by said bankrupt and accepted by said appellant in violation of the provisions of Section 67-e of the Bankruptcy Act, and the court was fully warranted from the facts alleged and proven in drawing the conclusion of law that the said deed of trust was so made and accepted. We have never considered it the proper practice to charge that an act was done with intent to hinder, delay or defraud. The proper practice, as we understand it, is simply to state the facts necessary to show the fraudulent intent. Whether said deed of trust was made with the intent to hinder, delay or defraud his creditors was a conclusion of law to be drawn by the court from the facts alleged and proven. The bill contained a prayer for general relief, so it was clearly within the province and jurisdiction of the court to grant to the said complainant such relief as the facts alleged and proven warranted.

Appellant on page 14, of his brief says:

> "We respectfully submit that at the time of the giving of the deed of trust in question Jones was not insolvent, and even if he was, it has not been shown that Dean had reasonable cause to believe him insolvent."

In the first place, the insolvency of the said Jones at the time the said deed of trust in question was given was a matter directly at issue and passed on by the court when the Circuit Court of Appeals affirmed the action of the District Court in adjudicating him an involuntary bank-

rupt and we submit that the same is no longer an open question.

Loveland in his admirable work on bankruptcy at page 558, says:

> "The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition. But when the question of insolvency is adjudged in determining the act of bankruptcy *in an involuntary proceeding*, the fact of insolvency at the date the act was committed may be taken by the adjudication." (Italics ours.)

Granting for the sake of argument that the insolvency of the said R. Crawley Jones on September 3, 1909, is not *res adjudicata*, it is respectfully submitted that the proofs in the record in this cause show conclusively that the said bankrupt was on the 1st, 3rd and 10th day of September, 1909, and for sometime prior thereto hopelessly insolvent, insolvent to such an extent that he must have known of his insolvency. The statement, which appears on page 25 of appellant's brief, is not a correct and fair statement of the assets and liabilities of said bankrupt. In said statement the farm is put down at $5,000.00. There is no legitimate evidence in the record to warrant any such value being placed on this farm and the same is merely guess work on the part of said appellant. This farm was assessed for taxation on the land books of Dinwiddie county for the year 1910 at the sum of $1,203.00 (R., 120) and when sold by James M. Quicke, Jr., trustee under a certain deed of trust from said bankrupt and wife, brought the sum of $2,920. In said statement the stock of goods and fixtures are put down at $3,000.00, although the same inventoried only the sum of $2,607.76 (R. 76) and a lot of the goods were worthless and had been in the stock of several merchants who had previously conducted the merchandise busi-

ness at the same stand (R., 79). In said statement accounts due said bankrupt are put down at $500.00. The undisputed evidence in the record is that of these said accounts $193.76 were worthless (R., 75). In said statement certain personal property on the farm is put down at $534.25. The undisputed evidence in the record is that when this personal property and the farm were sold by J. M. Quicke, Jr., trustee, enough was not realized therefrom to discharge in full the debt to R. E. Blakey, the beneficiary in said deed of trust (R., 60.) In said statement the corn, tobacco and pea crop is put down at $1,000.00. This valuation is based on the hearsay evidence of appellant (R., 111). It will be noted that said appellant in his testimony admits that he has never had any experience as a farmer, and so far as the record goes appellant had little or no knowledge of the value of the farm and the crops and other property thereon and had only visited the farm once and that was on September 10, 1909, when he went to get the said bankrupt to sign the deed of trust,—hence the above valuation is purely guess-work on his part (R., 50, 105 and 111). W. P. Wells, substituted trustee, who took charge of the crops on the farm, harvested and disposed of the same, states that he was only able to realize the sum of $210.00 therefrom (R., 74), and said substituted trustee further states that it was necessary for him to dispose of all the property mentioned in said deed of trust, except certain household and kitchen furniture, store accounts, which were turned over by him to said bankrupt on the advice of said appellant, and the alleged equity in said farm, in order to realize the net sum of $1,632.00, the amount of the notes given the said appellant by said bankrupt and interest thereon (R., 73 and 74). In said statement household and kitchen furniture are put down at $800.00 This valuation is based solely on the testimony of said appellant who, as stated above, had little or no knowledge of the value of the farm and the property located thereon. If the bankrupt had

household and kitchen furniture to the value of $800.00, it is somewhat strange that he failed to list same in his bankruptcy assets. An inspection of his bankruptcy schedules will show that he listed property of very little, if any, value, the property listed by him consisting only of certain worthless store accounts aggregating $193.76, five shares of stock of the Bank of Scottsburg, of the par value of $250.00, on which the said bankrupt had secured a loan of $250.00, practically its market value, two cash registers, valued at $150.00 and certain wearing apparel claimed by him as exempt under Poor Debtor's Law. No mention of household and kitchen furniture appears in his schedules. Surely if he had household and kitchen furniture of such value he would have listed same in his bankruptcy schedules and we can but infer that he had no such furniture. (Exhibit "X" certified up to Circuit Court of Appeals under stipulation of counsel.) In said statement the unsecured debts due by said bankrupt are put down at $5,394.08. According to a statement made out and in the possession of the said bankrupt prior to the execution of said deed of trust, (said statement being in the handwriting of said bankrupt) his unsecured indebtedness amounted to the sum of $7,665.80 instead of $5,394.08 (R., 80, 81 and 82). In said statement the amount due on said farm is put down at $3,000.00, when the correct amount due according to the testimony of J. M. Quicke, Jr., the trustee in said deed of trust on said farm, is $3,097.00 (R., 60). In addition to the above indebtedness there was his indebtedness to said appellant of $1,600.00 and interest, making a total indebtedness, not to mention the interest due on his many merchandise bills, of $12,362.86 instead of $10,834.25 as appears in appellant's brief. The said bankrupt listed in his bankruptcy schedules unsecured debts amounting to the sum of $7,515.73 which did not include the debt of $1,600.00 due appellant. (Exhibit "X.")

It is, therefore, respectfully submitted that, according to appellant's own statement in his brief, admitting as correct the fictitious values placed by him on the bankrupt's property, the said R. Crawley Jones was insolvent on September 3, 1909, and for sometime prior thereto.

We will now examine the proofs in the record and see whether the said appellant, at the time the said deed of trust was executed, had reasonable cause to believe the said bankrupt insolvent.

The proofs show that he knew that the said bankrupt was very much concerned about certain bogus notes held by certain banks in the city of Petersburg on which he was threatened with criminal prosecution, and on which his father, the said J. Samuel Jones, was liable as endorser; that in order to raise the required amount of money for the purpose of taking these bogus notes and in that way get in his possession all evidence of his crime and relieve his father's endorsement on said notes, he was willing to give him a deed of trust on "EVERYTHING" he had or possessed (R., 100); he knew that the bankrupt was at that time engaged in the general merchandise business at Darvills in Dinwiddie county and in the conduct of such business carried a varied stock of general merchandise (R., 101), which said stock of merchandise, together with the store fixtures, the said bankrupt was willing to mortgage if he could only get the necessary amount of money to take up said bogus notes, so to speak (R., 101 and 102); he knew that the bankrupt's stock of goods at Darvills had not been fully paid for, for J. Samuel Jones, the father of said bankrupt, told him so on his visit to appellant on September 2, 1909, (R., 105); he also had constructive, if not actual, notice that the farm was mortgaged to James M. Quicke, Jr., to secure one R. E. Blakey the payment of certain notes aggregating the sum of $3,000.00 and interest. On the 20th day of February, 1909, several months prior thereto, the said bankrupt had executed a deed of trust to James M.

Quicke, Jr., trustee, and the same had been recorded in Dinwiddie County on March 31, 1909 (R., 59); he knew from his letter that said bankrupt, who was his brother-in-law, had no one else from whom he could hope or look to for help in order to extricate himself from the awful position in which he had placed himself, and his pitiable appeal showed his awful plight and condition and his willingness to do almost anything with his property, regardless of the rights of his other creditors, in order to secure the money he needed to get possession of the bogus notes held by the banks in Petersburg; as a reasonable business man he knew that the said bankrupt could not give him a deed of trust on "EVERYTHING HE HAD," including his stock of goods and fixtures, to secure the notes sent him in his letter, and still continue to conduct his merchandise business at Darvills. Surely, as was said by Judge Cross in *Tilt* v. *Citizens Trust Co.*, 200 Fed. Rep. 410, (C. C. A., 3rd Cir.), the above facts were sufficient to have incited or caused the appellant, as a man of ordinary prudence, before making the loan, to have inquired diligently into the financial condition of said bankrupt.

The said deed of trust not having been actually executed until the 10th of September, 1909, at that time one of the notes secured thereby was already due which caused all of the notes to become due. The said deed of trust was admitted to record on Saturday, September 11, 1909, (R., 14) and on that same day, which was the very next day after the execution thereof, the said appellant directed his father, E. C. Dean, the trustee named in the said deed of trust, to take charge of the property and dispose of the same in accordance with the terms and provisions thereof (R., 109). On Monday, the 13th, the 12th being Sunday, the said E. C. Dean, trustee, in accordance with the directions of his son, the said appellant, took charge of the property mentioned in said deed of trust and proceeded to dispose of the same (R., 109). About a week or ten days

later, under an agreement between appellant and the attorney for certain creditors of said bankrupt, W. P. Wells was substituted as trustee in the place of the said E. C. Dean and disposed of all the property embraced in the deed of trust with the exception of an alleged equity in said farm, household and kitchen furniture, and certain store accounts which were turned over by him to the said bankrupt on the advice of the said Claude M. Dean (R., 74 and 57). Nothing was realized from the equity in the land and the personal property, for when same was sold by J. M. Quicke, Jr., the trustee in the prior deed, enough was not realized from the sale thereof to discharge in full the debt due R. E. Blakey secured thereby (R., 60).

At this point certain significant questions arise which cause doubt as to the position taken by appellant in his brief that at the time he made the loan and accepted said deed of trust he thought the said bankrupt was solvent, and in a prosperous financial condition, and had more than enough to pay everybody he owed. The first question that arises is: If he thought the said bankrupt, who was his brother-in-law, solvent and in a prosperous financial condition, why was he in such a hurry to sell him out—why did he on the very next day after the deed of trust was executed and on the very day the same was admitted to record in the clerk's office of Dinwiddie county direct his father, the trustee, to take charge and dispose of the property covered thereby? Was appellant so hard pressed for money and needed the money so badly that he could not give his brother-in-law a short extension of time within which to pay the notes?

Another question that presents itself is: If he thought his brother-in-law was solvent and in such a prosperous financial condition why did he require of him a deed of trust on everything he owned, (stock of goods and fixtures, household and kitchen furniture, live stock, growing crops of corn and tobacco and the tobacco already cut, store ac-

counts due him and in his equity in the land) and in that way publish to the world the unfortunate position in which his brother-in-law had placed himself? Did he not know that the creditors would not remain idle but would certainly take steps to try and collect a small part at least of the amounts due them and not permit all of the bankrupt's property, including goods not paid for, to be used to pay the notes secured by said deed?

The court will note that all the information regarding the financial condition of the bankrupt on which the said appellant claims he relied in making said loan is claimed to have been gotten from the said bankrupt and from the father of said bankrupt, the said J. Samuel Jones, who was liable as endorser on said notes, with the exception of certain statements claimed to have been made by J. W. Long, Cashier, both of whom were deeply interested in said notes being taken up. It was but natural and what should have been expected that said bankrupt, in his anxiety and desire to prevent the threatened criminal proceedings, and the said J. Samuel Jones in his anxiety to relieve himself of his liability as endorser on said notes, should make the bankrupt's financial condition appear good to the only party from whom they could hope for aid and help. If they did otherwise, they knew their only hope for the loan that would enable them to take up the notes would be blasted. In this connection, the attention of the court is called to the fact that appellant failed to call and examine the said J. Samuel Jones as a witness to substantiate the alleged statements claimed to have been made by him regarding the bankrupt's financial condition.

With regard to the alleged statements of J. W. Long, Cashier, on which appellant claims he relied in making said loan, Mr. Long denies making same, (R. pp. 63, 67, 90, 91, 94 and 95).

The recollection of the witness, John W. Long, instead of being "very hazy," as stated by appellant on page 17 of

his brief, was exactly the reverse as the record will show.

It is, therefore, respectfully submitted that said appellant as a man of ordinary prudence had knowledge of sufficient facts to have put him on inquiry and caused or incited him, before making the loan, to have inquired into the financial condition of said bankrupt. It was not sufficient for him to rely on the alleged statements of the said bankrupt and his father, both of whom he knew were deeply interested in the taking up of said notes; he should have made diligent investigation for himself in order to find out if the said bankrupt was in fact solvent, and not blindly, so to speak, made the loan. The means of knowledge were at hand and easily gotten. By his own admissions he failed to do what any ordinary prudent man under the circumstances would have done. Knowing that the bankrupt was engaged in the merchandise business and owed bills for merchandise purchased, he failed to make the slightest examinations of his books to find out the amount of his indebtedness for merchandise purchased (R., 115). He never even asked the said bankrupt anything as to the amount he owed on the stock of goods (R., 115). He never requested J. Samuel Jones to send him a statement in writing showing his son's assets and liabilities (R., 115). The bankrupt experienced little difficulty in making up his bankruptcy schedules. His books and papers would have shown his large indebtedness to merchants on account of goods furnished him.

Appellant on page 34 of his brief says:

> "It was a mere coincidence that Dean was present when the money he loaned the bankrupt was used by the bankrupt's father in paying the bankrupt's indebtedness at the bank."

It is an admitted fact in the record that the said Dean met the father of the said bankrupt by appointment in the

city of Petersburg, Virginia, on the day the notes were taken up for the purpose of taking up and getting possession of the notes of said bankrupt held by the banks in that city (R. pp. 105 and 106).

The following language appears on page 42 of appellant's brief:

> "The Circuit Court of Appeals in that case having thus declared the recipients (the banks who received the money loaned by Dean to Jones) of these payments to be preferred creditors, it would seem to have been the duty of the bankrupt's trustee to have pursued these preferred creditors, viz., the banks. But for some reason best known to himself, he abandoned the road thus pointed out in that opinion. He preferred to take another course, and to pursue the man who loaned the money and took security for such present loan. We can only surmise why this has been done. * * *"

In the case above referred to the sole question before the court was the question of the adjudication of the said R. Crawley Jones as an involuntary bankrupt. The banks were not even parties to the litigation and took no part therein, so the court could not have possibly held that the said banks were preferred creditors. No such question was ever raised by the pleadings in said case.

Since the distinguished counsel for appellant have seen fit to criticise the appellee for not making the Virginia National Bank of Petersburg a party to this litigation and seeking recovery of it, the attorney for appellee, in order that his position in the matter may not be misunderstood and the rights of the appellee prejudiced thereby, desires to give to the court the reasons why recovery from said bank was not sought.

The proofs in the case at bar show that no deed of trust was ever given to said bank; that it had no transaction

The following language appears on pages 57 and 58 of appellant's brief:

> "We respectfully submit that the transaction in question did not result in a reduction of the value of the assets of the debtor, * * *"

In reply to the above statement appellee would state that, if the said deed of trust in question is allowed to stand, the result of the transaction will be that the creditors, who sold the said bankrupt merchandise for the conduct of his business, will be deprived of all participation in the assets of said bankrupt. Absolutely nothing will be left for them.

One of the appellant's assignments of error is to the action of the Circuit Court of Appeals in holding said deed of trust invalid under section 60-b of the Bankruptcy Act. This assignment is based on the ground that the appellee failed to take a cross appeal.

Granting for the sake of the argument that the Circuit Court of Appeals was without authority to hold the said deed of trust invalid as an illegal preference under section 60-b, how is the appellant prejudiced thereby? The fact that the said court held the said deed of trust invalid under both section 60-b and section 67-e of said Act could not have prejudiced the appellant. If the said deed of trust is invalid under section 67-e that is sufficient to render the same null and void. No one will contend that the said deed of trust must be invalid under both of said sections in order to render the same null and void.

It is, therefore, respectfully submitted that there is no error in the decree of the Circuit Court of Appeals appealed from and the same should be affirmed.

Respectfully submitted,

BARTLETT ROPER,
Counsel for R. BEALE DAVIS, JR.,
Trustee, Appellee.

DEAN *v.* DAVIS, TRUSTEE IN BANKRUPTCY OF JONES, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 70. Argued November 6, 7, 1916.—Decided January 8, 1917.

A transfer of property by an insolvent, made to secure a contemporaneous loan of money which the lender advances, and the insolvent obtains and uses, for the discharge of a prëexisting debt of the insolvent to a third party, in which the lender has no interest, is not a preference of the lender within § 60b of the Bankruptcy Act, as amended February 5, 1903, 32 Stat. 797, 800.

A transfer, the intent or obviously necessary effect of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, "hinders, delays, or defrauds creditors" within the meaning of § 67e.

An insolvent borrowed money of a relative and secured it by a contemporaneous mortgage of all his property, which was recorded. The money was sought, advanced and used to satisfy one of his preexisting debts and thus enable him to escape a criminal prosecution. Mortgagee and insolvent both knew of the insolvency, and the circumstances were such that both must have anticipated the suspension of business and bankruptcy which followed the recording of the mortgage. *Held*, that these facts warranted the District Court and Circuit Court of Appeals in concluding that the insolvent intended to defraud his creditors within the meaning of § 67e and that the mortgagee was not a purchaser or lienor in good

faith (§§ 67e, 67d). *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575, 582; *Coder* v. *Arts*, 213 U. S. 223, 244.

A decree avoiding a transfer as fraudulent will not be disturbed upon the ground that it exceeds the pleadings where the bill, though attacking the transfer mainly as an unlawful preference, contains enough with the answer to present the issue of fraud, where that issue was fully tried, and the question of variance is first raised in this court.

212 Fed. Rep. 88, affirmed.

THE case is stated in the opinion.

Mr. Wyndham R. Meredith, with whom *Mr. C. V. Meredith* was on the briefs, for appellant:

Appellees not having taken a cross appeal from the decision of the District Court that the mortgage was not a preference, that question was not before the Court of Appeals for decision and it was error to decide it. *Chittenden* v. *Brewster*, 2 Wall. 195; *Loudon* v. *Taxing District*, 104 U. S. 774; *Bolles* v. *Outing Co.*, 175 U. S. 268; *Mail Company* v. *Flanders*, 12 Wall. 134, 135; *Field* v. *Barber Asphalt Company*, 194 U. S. 621; *Pauly Jail Bldg. & Mfg. Co.* v. *Hemphill Co.*, 10 C. C. A. 600; *B. & L. Ass'n.* v. *Logan*, 14 C. C. A. 133–136; *Clark* v. *Killian*, 103 U. S. 766, 769; *United States* v. *Blackfeather*, 155 U. S. 180–186.

Mere knowledge by a lender that the money borrowed is to be applied by the insolvent to prefer a creditor does not make the security given invalid as a preference under § 60b of the Bankruptcy Act. *Coder* v. *Arts*, 213 U. S. 223; *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575; *Githens* v. *Shiffler*, 112 Fed. Rep. 505, 507; *In re Hersey*, 171 Fed. Rep. 1001; *George* v. *Grant*, 28 Hun. (N. Y.), 69, affirmed in 97 N. Y. 270; *In re Baar*, 213 Fed. Rep. 629–630. Under that section the person preferred must be a creditor. Collier on Bankruptcy, 10th ed., p. 813; *Stewart* v. *Platt*, 101 U. S. 731; *George* v. *Grant*, *supra*. It does not apply when the security is given to carry out a definite

promise which procured the loan. Loveland on Bankruptcy, 4th ed., p. 952; *Sexton* v. *Kessler & Co.*, 172 Fed. Rep. 535, 542–545; *Hauslet* v. *Harrison*, 105 U. S. 401; *Goodnough M. & S. Co.* v. *Galloway*, 156 Fed. Rep. 504–510; 171 Fed. Rep. 940–949; *In re Wolf*, 98 Fed. Rep. 84; *Walker* v. *Brown*, 165 U. S. 654, 664–665; *Davis* v. *Turner*, 120 Fed. Rep. 605; *Tomlinson* v. *Bank*, 145 Fed. Rep. 824; *Mills, Trustee*, v. *Virginia-Carolina Lumber Co.*, 164 Fed. Rep. 168; *Douglas* v. *Vogeler*, 6 Fed. Rep. 53; *In re Davidson*, 109 Fed. Rep. 882.

The transfer was not fraudulent. An intent to prefer is not an intent to defraud. It is not *per se* unlawful for an insolvent to borrow money to use in making a preference, and the lender, though aware of all the facts and even if he act as the borrower's agent in making the payment, *Crim* v. *Woodford*, 136 Fed. Rep. 34, commits no wrong in lending, or in taking security. Such transactions are not voidable under § 67e unless accompanied by actual intent to defraud, which must be clearly proved and was absent in this case. Institution of bankruptcy proceedings within four months does not relate back and convert what was a lawful transfer into a fraudulent conveyance. *Coder* v. *Arts, supra; Van Iderstine* v. *National Discount Co., supra; Githens* v. *Shiffler, supra; In re Hersey, supra; Stewart* v. *Dunham*, 115 U. S. 61; *Estes* v. *Gunter*, 122 U. S. 450; *Smith* v. *Craft*, 123 U. S. 436; *Huntley* v. *Kingman*, 152 U. S. 527; *Southern White Lead Co.* v. *Haas*, 73 Iowa, 399; Black on Bankruptcy, ed. 1914, § 459, p. 1002.

In Virginia it has been repeatedly held that an honest preference, even when operating to defeat the claims of other creditors, is entirely lawful and no evidence of an intent to hinder, delay or defraud creditors. *Johnson* v. *Lucas*, 103 Virginia, 36; *Johnson* v. *Witt Shoe Co.*, 103 Virginia, 611; *Alsop* v. *Catlett*, 92 Virginia, 364; *Harvey* v. *Anderson*, 2 Va. Dec. 385; *Williams* v. *Lord*, 75 Virginia,

390; *Lucas* v. *Clafflin*, 76 Virginia, 269; *Alexander Sav. Inst.* v. *Thomas*, 29 Gratt. 483, 490; *Skipwith* v. *Cunningham*, 8 Leigh, 271.

The Virginia statute relating to fraudulent conveyances is copied from 13th Elizabeth, from which the words "hinder, delay and defraud creditors," were adopted by Congress in the Bankruptcy Act. They mean the same in that act as in the English statute.

Transfers made in good faith to secure present loans protected by state statute are protected by § 67d. Collier on Bankruptcy, 9th ed., p. 950, and cases cited. The transaction in question is also unobjectionable because shown not to have diminished the value of the estate. See Collier on Bankruptcy, 10th ed., p. 803; Remington on Bankruptcy, §§ 1278, 1295, 1320; *Cook* v. *Tullis*, 18 Wall. 332; *Stewart* v. *Platt*, 101 U. S. 818; *Jaquith* v. *Alden*, 189 U. S. 78.

The charge that the bankrupt preferred the bank to avoid criminal prosecution, even if true, is immaterial, the debt paid being valid. *Peters* v. *Bain*, 133 U. S. 67; *Ex parte Stubbins*, 17 Ch. Div. (L. R. 1881), 670; *Ex parte Caldecott*, 4 Ch. Div. (L. R. 1876), 155; *Githins* v. *Shiffler*, 112 Fed. Rep. 505; *Tiffany* v. *Boatman's Institute*, 18 Wall. 388.

Mr. Bartlett Roper and *Mr. Richard B. Davis* for appellees, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Bankruptcy Act, as amended February 5, 1903, provides in § 60b that if a debtor has within four months before the filing of the petition in bankruptcy made a transfer which the person receiving the same has reason to believe was intended to give a preference, the transfer

But under § 67e the basis of invalidity is much broader. It covers every transfer made by the bankrupt "within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them" "except as to purchasers in good faith and for a present fair consideration." As provided in § 67d, only "liens given or accepted in good faith and not in contemplation of or in fraud upon this Act" are unassailable. A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act "hinders, delays or defrauds creditors" within the meaning of § 67e. *Van Iderstine* v. *National Discount Co.*, 227 U. S. 575, 582, points out the distinction between the intent to prefer and the intent to defraud. A transaction may be invalid both as a preference and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer. Making a mortgage to secure an advance with which the insolvent debtor intends to pay a preëxisting debt does not necessarily imply an intent to hinder, delay or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect "good faith." But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advanced is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made.

We cannot say that the facts found by the District Court and affirmed by the Circuit Court of Appeals were

not supported by the evidence, nor that these courts erred in concluding upon this evidence that the mortgage was made with the purpose and intent to hinder, delay or defraud Jones' creditors and that Dean was not as against general creditors "a purchaser in good faith." Jones knew that he was insolvent. He knew that he was making a preferential payment. He must have known that suspension of his business and bankruptcy would result from giving and recording a mortgage of all his property to secure a note which had matured before the mortgage was executed. The lower courts were justified in concluding that he intended the necessary consequences of his act; that he willingly sacrificed his property and his other creditors to avert a threatened criminal prosecution; and that Dean, who, knowing the facts, coöperated in the bankrupt's fraudulent purpose, lacked the saving good faith.

The conclusion reached by the lower courts is supported by many decisions of the several District Courts and Circuit Courts of Appeals, which are referred to in the margin.[1] It is in harmony with both the *Van Iderstine*

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[1] Cases holding that a mortgage is a fraudulent conveyance where taken as security for a loan which the lender knows is to be used to prefer favored creditors in fraud of the act: *Parker* v. *Sherman*, 212 Fed. Rep. 917 (C. C. A. 2d Circuit); *In re Soforenko*, 210 Fed. Rep. 562 (D. C. Mass.); *Johnson* v. *Dismukes*, 204 Fed. Rep. 382 (C. C. A. 5th Circuit); *Lumpkin* v. *Foley*, 204 Fed. Rep. 372 (C. C. A. 5th Circuit); *In re Lynden Mercantile Co.*, 156 Fed. Rep. 713 (D. C. Wash.); *Roberts* v. *Johnson*, 151 Fed. Rep. 567 (C. C. A. 4th Circuit); *In re Pease*, 129 Fed. Rep. 446 (D. C. Mich.). See also *Walters* v. *Zimmerman*, s. c. on appeal, 208 Fed. Rep. 62 (D. C. Ohio), 220 Fed. Rep. 805 (C. C. A. 6th Circuit).

Cases upholding the mortgage security because the lender did not know that the insolvent borrower intended to make improper payments to favored creditors—thus indicating that the mortgage would be fraudulent if such additional fact were shown: *Grinstead* v. *Union Savings & Trust Co.*, 190 Fed. Rep. 546 (C. C. A. 9th Circuit); *Powell* v.

Case, and *Coder* v. *Arts*, 213 U. S. 223, 244, upon which appellant particularly relies. In each of these cases this court refused to hold fraudulent in law a transfer which the Circuit Court of Appeals had found to be innocent in fact. In the *Van Iderstine Case*, where a pledge was held valid, the Circuit Court of Appeals had expressly found that the pledgee was without knowledge of the debtor's fraudulent intent, if such there was. In *Coder* v. *Arts*, where a mortgage was held valid, the Circuit Court of Appeals had found that in making the mortgage the debtor had no intent to hinder, delay or defraud creditors, and this court said that "in view of the finding of the Circuit Court of Appeals, it may be that [he], though including in the conveyance a large amount of his property, acted in good faith, with a view to preserving his estate and enabling him to meet his indebtedness." This court while declaring itself bound by the facts so found, was careful to express its dissent from the view "that the giving of the mortgage and its effect upon other creditors could not be

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Gate City Bank, 178 Fed. Rep. 609 (C. C. A. 8th Circuit); *In re Kullberg*, 176 Fed. Rep. 585 (D. C. Minn.); *Ohio Valley Bank Co.* v. *Mack*, 163 Fed. Rep. 155 (C. C. A. 6th Circuit); *Stedman* v. *Bank of Monroe*, 117 Fed. Rep. 237 (C. C. A. 8th Circuit); *In re Soudan Mfg. Co.*, 113 Fed. Rep. 804 (C. C. A. 7th Circuit).

In accord with this view are also the decisions which hold that a general assignment for the benefit of creditors, though without preferences, is void under § 67e because its necessary effect is to hinder, delay or defraud creditors in their rights and remedies under the Bankruptcy Act. *In re Gutwillig*, 90 Fed. Rep. 475; 92 Fed. Rep. 337; *Davis* v. *Bohle*, 92 Fed. Rep. 325; *Rumsey & Sikemier Co.* v. *Novelty & Machine Mfg. Co.*, 99 Fed. Rep. 699. See *Randolph* v. *Scruggs*, 190 U. S. 533, 536; *West Co.* v. *Lea*, 174 U. S. 590, 596.

It is difficult to reconcile the following cases or dicta in them with the great weight of authority and the decisions of this court. *In re Baar*, 213 Fed. Rep. 628 (C. C. A. 2nd Circuit); *In re Hersey*, 171 Fed. Rep. 1004 (D. C. Iowa); *Sargent* v. *Blake*, 160 Fed. Rep. 57 (C. C. A. 8th Circuit); *In re Bloch*, 142 Fed. Rep. 674 (C. C. A. 2nd Circuit); *Githens* v. *Shiffler*, 112 Fed. Rep. 505 (D. C. Pa.).

considered as an item of evidence in determining the question of fraud."

Dean contends also that relief should not have been granted under § 67e because the bill was framed under § 60b. The objection was not taken in the District Court, although the question of invalidity under § 67e was elaborately discussed on demurrer to the bill as well as upon final hearing. Twenty-five other errors were assigned on the appeal to the Circuit Court of Appeals. This objection was not raised then. It was insisted only that the evidence did not warrant the finding of fraudulent intent. Section 60b seems to have been mainly in the mind of the pleader when the bill of complaint was drafted, but not exclusively, for it alleges that the plaintiff as trustee was entitled "to recover property transferred by said bankrupt in fraud of his creditors." The answer expressly alleges that the mortgage was accepted "without any intent or purpose of aiding said Jones to defraud, delay or hinder his creditors, and not in contemplation of or in fraud of the bankrupt act, or any of its provisions, believing him to be solvent and that he would continue his business." The issue of fraudulent transfer was presented by the pleadings, was fully tried and was found against the appellant. No error was committed.

Decree affirmed.